

Protection Against Multiple Discrimination in EU Member States Law: A Case Study

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Abstract. Despite the development of antidiscrimination law, protection against multiple discrimination remains a key challenge. The complexity of multiple discrimination shows insufficient legislation and case studies. In this article, a comprehensive analysis of EU Member States' legal regulation and case law is provided. The division into three categories of EU Member States was done according to legal treatment regarding multiple discrimination. A conclusion is made that the legal framework and case law in EU Member States with lack of awareness regarding the approach to multiple and multiple intersectional discrimination. In the EU Member States, the case law regarding protection against multiple discrimination is fragmented. A special study about the Lithuania EU Member State regarding legal regulation and case law was concluded.

Keywords: antidiscrimination; multiple discrimination; case law; legal regulation.

1. Introduction

EU Agency for Fundamental Rights indicated the definition for multiple discrimination. It is a discrimination action with several grounds separately operating. Multiple intersectional discrimination is a discrimination where few grounds operate together in connection at the same time and they are non separated, together creating specific types of discrimination (EU Agency for Fundamental Rights, 2018). The term is not mentioned in legal acts, nor is it recognized and developed in the national court practice of most EU Member States. According to the treatment of multiple discrimination, EU Member States might be conditionally distributed into three subgroups: where multiple discrimination is not recognized and not developed in case law; countries where prohibition of multiple discrimination is enshrined in legal acts and developed in case law; countries where it is not established in legal acts but is developed in case law. It should be noted that ban of multiple discrimination is enshrined in national legal acts of only nine EU Member States, where the case law of national courts regarding multiple discrimination issues is being formed accordingly. In order to adequately reveal the ban for multiple discrimination all EU Member States with legal regulation and case law on multiple discrimination were selected to be analysed.

The concept of discrimination in Lithuanian (as one of EU Member State) law is most clearly and broadly defined by the Law on Equal Treatment. The Law on Equal Opportunities for Women and Men repeats definitions of direct and indirect discrimination, linking them to gender. It should be noted that multiple discrimination is not mentioned or discussed in the above legal acts; however, Lithuania has received calls from UN institutions to ensure protection regarding multiple discrimination in its national legal acts.

2. Legislation Framework of Multiple Discrimination

Only a few EU Member States –Austria, Bulgaria, Portugal, Germany, Greece, Croatia, Italy, Romania and Spain – are addressing multiple discrimination issues in their laws. Ban for multiple discrimination is enshrined in national legal acts of the following countries. In domestic law, for example, Protection against Discrimination Act of Bulgaria, Anti-Discrimination Act of Croatia, Romania's Ordinance (GO) 137/2000 multiple discrimination considered as discrimination for two grounds and more. These national legal acts state that multiple discrimination is more complicated and it is a more serious offence (Ordinance (GO) 137/2000, 2000). Together with categories such as repeated discrimination (Anti-discrimination Act, 2008), continuing discrimination, or discrimination with particularly harmful consequences for the victim, authorities are instructed to prioritize appropriate measures (Protection Against Discrimination Act (PADA), 2016).

In Portugal, multiple discrimination is understood as a permutation of a minimum of two or more grounds of discrimination, together with factors (Portugal, Law 93/2017, 2017). Germany's law states that any kind of discrimination based on some grounds must be assessed on the basis of each of these grounds. It should also be noted that authorities, competent agents and representatives from Parliament must cooperate in cases of multiple discrimination (Chopin & Germaine, 2020).

Austrian Equal Treatment Act further explains that multiple grounds discrimination must be assessed in the context of a wide approach by considering the fact that the grounds cannot be assessed in isolation (Chopin & Germaine, 2020). After legal acts regarding employment law and social insurance were reformed in Greece in 2011, a reference to multiple discrimination was formed (Chopin & Germaine, 2020).

Some countries only examine discriminatory grounds for certain combinations, such as the Italian legal regulation, which requires equal treatment, regardless of a person's race and ethnic origin, meaning that the same forms of discrimination that may have different effects and perspectives on women and men, as well as effects of cultural and religious forms of racism, i.e., the ground of race and ethnic origin can be combined with the ground of gender as well as the ground of religion and beliefs (Favilli,

2016). The legislator specifies the ground of gender necessary for multiple discrimination; thus, multiple discrimination is possible only when one of its grounds is based on gender.

It should be noted that protection against multiple discrimination in EU Member States is enshrined inside local legal acts. Regularly multiple discrimination is perceived as an unequal treatment for more than one ground; however, definitions of the concept of multiple discrimination are not broad or comprehensive and not supported by detailed descriptions.

3. Case Law Study Regarding Multiple Discrimination in EU Member States

The national legal acts of most EU Member States do not mention multiple discrimination; however, this does not prevent victims of multiple discrimination from bringing claims on several grounds. In this case, national courts do recognize multiple discrimination in their case law, even though multiple discrimination is not enshrined in national legal acts.

There is one group of countries whose national laws establish the prohibition of multiple discrimination. Although Austria has legal regulation regarding multiple discrimination, there is not much case law in this area. In its Judgment, No 80bA63/09m of 22 September 2010, the Austrian Supreme Court (Oberster Gerichtshof) drew attention to multiple discrimination. While examining a case of multiple discrimination in the labour relations, the Supreme Court determined multiple discrimination against a young woman whose employer did not allow her to wear a hijab, told her to change her name to something more "locally acceptable," and asked her to dye her hair (Solanke, 2010). Supreme Court did not specify how the courts should deal with this problem, although national laws require cases of multiple discrimination to be resolved and indicate that cases of multiple discrimination suppose to have significant remuneration (Schindlauer, 2019). In another case, the Austrian Commission of Equal Treatment determined multiple discrimination regarding a young Muslim woman who was told by her employer not to wear a hijab on her way to or at work, was prohibited from mentioning her Turkish origin to customers, and was harassed. Her employer later terminated her training contract, arguing that customers would not want to be served by a woman of Turkish origin. Austria's Equal Treatment Act determined multiple discrimination on the grounds of ethnic origin and religion, gender, together with harassment for the same reasons (Solanke, 2010).

The Constitutional Court of Italy recognized a double ground of discrimination in a case regarding nationality-disability, determining discrimination against disabled persons from third countries who were denied access to social security and other benefits. It was decided that third-country nationals are entitled to benefits (Fredman, 2016). In Spain, the Supreme Court of Justice of Galicia found dismissal regarding an employee to be unlawful since the company did not treat her equally regarding gender, freedom of opinion, or any personal or social circumstances and ideology (Fredman, 2016). It was noted that employee felt discriminated on several grounds but did not distinguish whether one of the grounds was more important than the other.

There is another group of countries where protection against multiple discrimination is not indicated in legislation but is ensured in the case law of national courts. Although there is no clear statutory or regulatory reference to multiple discrimination, the courts in France consider claims made on the grounds of multiple discriminatory grounds (Fredman, 2016). For example, Appeal Court in France has recognized multiple discrimination in career development regarding disability, health condition and membership at trade union, indicating that discrimination arose from several different grounds. In practice, French courts allow claimants to bring claims when persons are discriminated against on multiple grounds. It should be noted that the university entry process or labour relations may be affected with the combined grounds of nationality together with age or gender together with age (Fredman, 2016).

However, the possibilities of harmonizing the grounds of discrimination are complicated in some countries due to different legal acts regulating the said grounds. In Belgium, every ground for the composite complaint supposes to be contested severally to the connection with three separate legal acts (Fredman, 2016). A Belgian court has determined multiple discrimination for age together with gender

when a claimant, put an application for a job at a company where services are provided with service coupons. He received a rejection letter on the same day, stating that the company basically only employs women in their 20s and 30s, and that the applicant does not fit into this category (Chopin & Germaine, 2020). The national court decided that examined situation is multiple discrimination on the grounds of gender and age. Violations of two different anti-discrimination legal acts were identified, and two different grounds were pointed to age and gender.

Courts in Sweden examine multiple discrimination cases similarly, even though there are no specific multiple discrimination provisions in the country's legal acts. An important multiple discrimination case regarding age and gender discrimination was examined by the Swedish Labour Court in 2010. An old female applied to work as a recruitment specialist but was not hired or even invited for a conversation. The employer was unable to prove that the female inappropriate for work position. Court decided that the discrimination was for age and gender since the woman was not invited to the job interview. Although discrimination was determined on two grounds, but there was not necessary to increase the compensation (Fredman, 2016).

In 2009, the Poland Supreme Court made decision regarding multiple discrimination in case for different retirement age for men 65 and 60 for women. This decision states that two types of discrimination arise in this case – indirect regarding gender together with direct discrimination regarding age (Fredman, 2016). Regional and district courts have also made similar decisions in the case regarding sexual orientation together with body weight (Fredman, 2016).

Latvia District Court determined multiple discrimination based on gender and financial status on its own initiative – the claimant only argued discrimination based on gender but not on financial status (Solanke, 2010). Whereas Czech courts have not ever explicitly recognized multiple discrimination regarding gender and nationality when sterilization of Roma women was challenged. These cases were mostly related to sterilization when the country was part of the Soviet Union.

In 2000, a Dutch court awarded higher damages for multiple discrimination in a case that recognized discrimination regarding gender and race. The employer terminated the employee's employment contract because he believed that the employee would not return to work full-time after her maternity leave since she is of Moroccan origin and married to a "traditional Moroccan" (Fredman, 2016). There is also no legal regulation of multiple discrimination in this country.

4. Problems of Protection Against Multiple Discrimination in Lithuanian

The Constitution of the Republic of Lithuania bans discrimination based on the grounds of race, gender, nationality, language, origin, social status, belief, convictions, or views. Principle of non-discrimination important element regarding human rights protection. Assessing together with the principle of equality of all persons creates the foundations for respecting human dignity and instilling respect.

It should be noted that the Committee on the Elimination of Discrimination against Women (hereinafter – CEDAW Committee) provided a conclusion for Lithuania, which submitted its Fifth Report on Implementation of the United Nations Convention on the Elimination of Discrimination against Women in Lithuania, that the definition of equality and non-discrimination is insufficient in Lithuanian legal acts due to multiple discrimination forms (Fifth periodic reports of States parties: Lithuania, 2011). The CEDAW Committee noted in its conclusion that the antidiscrimination law doesn't defend women from multiple or intersectional discrimination. In conclusion, observations lack of multiple discrimination cases in courts is a concern, and calls are made to amend the country's laws related equal treatment in order to ban exclusively from multiple discrimination forms. The truth is that the absence of legal regulation of multiple discrimination and national courts practice raises questions about proper enforcement of equal treatment. The country's government is not paying enough attention to the problem, is not addressing the issues of multiple discrimination, and is ignoring the calls to amend laws regarding the ban of multiple discrimination.

In its Sixth Report on Implementation of the United Nations Convention on the Elimination of Discrimination against Women in Lithuania, the Government of the Republic of Lithuania has indicated

that ban regarding gender grounds is in law, and the definitions of discrimination ensure the protection of women against multiple discrimination. However, the scope of multiple or intersectional discrimination does not exist in Lithuanian legal acts. The CEDAW Committee presented an additional list of questions and issues to the drafters of the Lithuanian national report regarding the Sixth Report, requesting to provide information on multiple intersectional discrimination. A request was also made to clarify how the definitions of discrimination in the Law on Equal Opportunities for Women and Men and the Law on Equal Opportunities ensure the protection of women against forms of multiple intersectional discrimination, and to detail the legal standards and compensation programs for women victims of multiple intersectional discrimination, particularly for women and girls who live in rural areas, who are migrants or asylum seekers, or who have disabilities. Thus, the problem of absence of the multiple discrimination concept in national law is repeatedly emphasized.

With conclusion CEDAW Committee reiterated the need to integrate the principles of equality and non-discrimination, and recommends Lithuania to consider the possibility of adopting comprehensive laws clearly protecting women from multiple, intersectional discrimination, and of clearly distinguishing the scope of gender and gender identity in legal acts (Concluding observations on the sixth periodic report of Lithuania, 2019). In the context of such a situation, it is recommended to ensure full opportunity for disadvantaged or marginalized persons to apply to court: minority women, migrant women, women living in rural areas, older women, women with disabilities, lesbian, bisexual and transgender women, and intersex persons. These groups are distinguished as experiencing multiple discrimination in various studies. The said recommendations indicate the need to solve the problem of stereotypes in the education system. Lithuania was recommended to create a separate action plan that would reduce the prevalence of gender stereotypes in educational material and curricula (Concluding observations on the sixth periodic report of Lithuania, 2019).

Reference to multiple discrimination is enshrined in the United Nations Convention on the Rights of Persons with Disabilities. The Convention and its Optional Protocol were ratified by the Republic of Lithuania on 27 May 2010 and entered into force on 17 September 2010. It is also necessary to note that the EU has also joined this convention. The approach to multiple intersectional discrimination is also discussed in the United Nations Convention on the Rights of Persons with Disabilities.

The preamble of the United Nations Convention on the Rights of Persons with Disabilities states that countries are concerned about the difficult conditions faced by disabled people who experience multiple or more severe forms of discrimination based on race, skin colour, gender, language, religion, political or other views, national, ethnic, social or indigenous origin, financial situation, age or other status. At the same time, Article 6 states that countries recognize that women and girls with disabilities experience multiple forms of discrimination and, as a result, Member States take measures to ensure that women and girls with disabilities can fully and equally enjoy all human rights and fundamental freedoms (UN Convention on the Rights of Persons with Disabilities (2006). It should be noted that in the official translation of this convention into Lithuanian, the legal act does not refer to the original term of multiple discrimination but of various forms of discrimination. It should also be noted that Article 8(b) focuses on public education, and Member States undertake to implement immediate, effective and appropriate measures in all areas of life. Moreover, it should be pointed out that there is greater risk of multiple intersectional discrimination when various stereotypes prevail in society.

It is recognized that the concept of disability is still evolving results from interceptions between persons with health disorders, the views regarding them, and the barriers created by the environment, preventing such persons from fully and effectively participating in society on an equal basis with other people. Article 17 of the Convention emphasizes that every disabled person is entitled to have his or her right to physical and mental integrity respected on an equal basis with other people. S. Atrey argues that integrity refers to the concept of a person as a whole, including all of his or her characteristics, not just disability, and that this can be a broader theory of intersectionality that needs to be considered, as well as a basis for the inviolability of all human beings that embraces all the multifaceted characteristics of individuals (Atrey, 2015).

The United Nations Committee on the Rights of Persons with Disabilities monitors the implementation of provisions of the UN Convention on the Rights of Persons with Disabilities in the Member States. It should be noted that the Republic of Lithuania in terms of both the convention and the additional protocol, therefore the possibility of individual petitions is valid. The Committee on the Rights of Persons with Disabilities examined first explanation, adopted concluding remarks regarding fulfilment UN Convention on the Rights of Persons with Disabilities. It is recommended prevention of discrimination against females with disabilities, to the progress, encouragement together with empowerment measures, especially encouragement to participate in public life, as well as to the prevention and elimination of multiple and intersectional discrimination (Concluding observations on the initial report of Lithuania, 2016). It should be noted that, in order to properly implement equality while also ensuring proper implementation of international agreements, legislators must ensure protection against multiple discrimination in local legal acts, thereby ensuring adequate protection against discrimination. As long as legislators delay establishing legal regulation of multiple intersectional discrimination, equality and non-discrimination cannot be properly implemented.

The Equal Opportunities Ombudsperson Office (hereinafter – Office) is receiving complaints regarding discrimination on several grounds. Although decisions of the Office do not mention multiple discrimination or multiple intersectional discrimination, and each discriminatory ground is examined separately in a complaint, there are adopted decisions that recognize several grounds discrimination. Some of the filed complaints can also be examined in the context of multiple intersectional discrimination by taking into account the interaction of discriminatory grounds.

In its reports, the Office also draws attention to multiple discrimination and the call of UN institutions to regulate multiple and intersectional discrimination, as well as clearly states that it does investigate complaints regarding multiple discrimination. For example, the Office's last report of 2020 indicates that almost 6 percent of appeals in 2020 were made due to multiple discrimination, i.e., appeals were made for discrimination on more than one ground (appeals: complaints and inquiries via social network). In connection with discrimination based on nationality, applicants also felt discriminated against due to their origin or ethnicity. A significant part of all cases conducted regarding discrimination on the ground of status in society were together related to several possible grounds of discrimination. It was indicated not two but three or four discriminatory grounds. Cases on several grounds of discrimination were based on social status linked to age, gender, beliefs, or views.

The Office examined a complaint regarding possible discrimination based on disability and age in reimbursement of costs of medical aids. The applicant complained that, pursuant to the list of reimbursable medical aids approved by order of the Minister of Health of the Republic of Lithuania, the conditions for provision of reimbursable medical aids are worsened for persons with disabilities after reaching the age of 18. A disabled person is provided with more diapers per month until he turns 18, however, upon reaching adulthood and if the person's health condition does not change, he is provided with fewer reimbursed diapers per month. The conclusion of the Equal Opportunities Ombudsperson states that the procedure for reimbursement of medical aid costs depending on the age of the disabled person, which is approved under the said list, directly discriminates against persons on the ground of age, and does not ensure the medical aid services necessary due to the nature of a person's disability (Decision No. (17)SN-170)SP-109, 2017). Although indirect discrimination based on disability was not clearly named, it is likely that in this situation the applicant faced multiple intersectional discrimination, even though this is not mentioned in the decision. It can be assumed that discrimination was caused by the interaction of both discriminatory grounds, since the applicant's health condition did not change upon reaching adulthood. However, if the person had no disability and was healthy, this would not have caused any discriminatory consequences for him, since reimbursement applies only to disabled persons.

In another decision regarding possible discrimination based on gender and age, the Equal Opportunities Ombudsperson clearly states that discrimination is caused on two grounds. This decision stands out in that, although there is no reference to multiple discrimination in the decision itself, the

report notes that in 2019, one of the investigations carried out at the initiative of the Ombudsperson was about multiple discrimination referred together gender age in the sphere of labour relations, and provides a link to the decision (Decision No. (19)SI-12)SP-111, 2019).

Attention should also be drawn to the case examined by the Supreme Administrative Court of Lithuania regarding refusal to issue a temporary residence permit in Lithuania to a person on the basis of marriage between persons of the same sex. This case can be examined in the context of multiple intersectional discrimination. Same-sex marriage was registered in the Kingdom of Denmark between a citizen of Lithuania and a citizen of Belarus. The citizen of Belarus applied for a temporary residence permit in Lithuania on the basis of family reunification. The Migration Department rejected this application, arguing that if a marriage is not included in the records at the civil registry office, it cannot be considered a valid basis (family reunification basis) for issuing a temporary residence permit in the Republic of Lithuania. The dispute reached the Vilnius Regional Administrative Court, which rejected the applicant's complaint as unfounded, stating that the civil registry office in the Republic of Lithuania could only include data of marriages registered in a foreign country if such marriages are concluded between persons of different sexes, and if the accounting of such marriages is mandatory. The decision of the Migration Department did not imply a discriminatory attitude towards persons due to their sexual orientation since only the legal status of the applicant was assessed, including whether a marriage concluded between two persons of the same sex can be recognized as legal in the context of provisions of national legal acts, in which case a satisfied complaint would mean recognition (legalization) of this type of marriage, which would contradict the provisions of national legal acts.

The applicant did not agree with the decision and appealed to the Supreme Administrative Court of Lithuania, stating that the detailed, systematic interpretation of the norms only confirms that persons who have entered into a marriage with a person of the same sex are discriminated against due to their sexual orientation because they are not guaranteed the right to live together with their spouse. Legal acts do not establish that a marriage must be concluded only between persons of different sexes, and in applying the European Union law.

Even though the applicant complained that he was discriminated against on the ground of sexual orientation, the applicant was actually discriminated against on two grounds – gender (this issue does not affect all men) and sexual orientation (this issue does not affect all people regarding their sexual orientation). The court noted that data on marriages registered in a foreign country can only be included in marriage records if such marriages are concluded between persons of different sexes. According to Paragraph 5 of Article 10 of the Law on Equal Opportunities for Women and Men, any actions or other behaviour that discriminates against a person on the ground of gender is considered a violation of the equal rights of women and men. The truth is that the grounds of sexual orientation and gender are closely related since it is the attraction to different, same or both sexes that is the basis of sexual orientation, i.e., a person's sexual orientation is assessed through his or her relationship with both genders. Therefore we should not isolate the intersection of these two grounds in the context of the case and should simultaneously assess the effect of the interaction of these two grounds in the context of multiple intersectional discrimination. In this case, both male and female same-sex couples would likely be discriminated against for the same reason, i.e., due to being in a same-sex couple, and a greater negative effect on the ground of gender also occurs when this ground intersects with other grounds. For example, when discrimination on the ground of sexual orientation was not yet prohibited, claimants argued that discrimination based on the gender of their partner should be considered discrimination on the basis of sex.

The Constitutional Court emphasized the case that the constitutional concept regarding family is gender-neutral, and the decline to provide a permit cannot be only on a foreigner's gender identity and/or sexual orientation (Judgement No. KT3-N1/2019, 2019). It is emphasized due to gender identity and/or sexual orientation, which can as well considered a degradation regarding human dignity. In addition, prevailing attitudes cannot be constitutionally justified on the basis of constitutionally important goals, i.e., public order, to discriminate against persons solely because of their gender identity and/or sexual

orientation. Attention was important to the fact that, in ensuring the free movement of persons, the private and family life of EU citizens must be respected, and any discrimination, including on the grounds of gender and sexual orientation, must be prohibited. The ruling also takes into account the case law of the ECtHR that prohibition of discrimination also applies to discrimination regarding sexual orientation. In addition, there must be very strong and compelling reasons to justify different treatment of persons on the ground of their gender, including their sexual orientation. The ruling formulated a clear reference to intersectional discrimination based on sexual identity (gender) and sexual orientation. Therefore, it can be concluded that the initial decision of the Migration Department was discriminatory, and it can be presumed that the person experienced multiple intersectional discrimination due to interaction of the grounds of sexual orientation and gender.

The Constitutional Court has noted in its conclusion in another case that one of the prohibited forms of discrimination (as well as degradation of human dignity) is harassment, including gender-based harassment and sexual harassment. Parliament member K. P. communicated with his assistants-secretaries and with candidates applying for these job position inappropriately and in a disrespectful manner both at work and during job interviews, i.e., made comments on their appearance and physical characteristics, emphasized his exceptional social status, indicating it to be higher than that of his employees and job applicants, as well as made humiliating and belittling comments about women. In addition, only young women were invited to job interviews, with a preference for unmarried applicants with no close personal relationships. The Commission for Ethics and Procedures of parliament established that K. P. prioritized certain gender, appearance, age, and personal life circumstances both at work and during job interviews, i.e., discriminated on multiple grounds of gender, age, family and social status. This case can be viewed in the context of multiple intersectional discrimination, since a certain combination of women's characteristics was preferred, i.e., only young, attractive and unmarried women were selected. The Constitutional Court pointed conclusion that gender-based harassment is defined as unacceptable or unwelcome physical, verbal or non-verbal behaviour related to gender, which, among other things, aims to degrade or degrades human dignity, and sexual harassment. It is also a form of gender-based harassment, characterized by unwanted sexual advances toward the person being harassed (Conclusion No. KT20-I1/2017, 2017).

5. Conclusions

As mentioned in EU Member States, multiple discrimination includes the established prohibition of discrimination on more than one ground; however, there is no prohibition on intersectional multiple discrimination due to the interaction of several grounds when evaluation for different grounds cannot be separated.

Based on the practice of local courts, it might be drawn conclusion that the practice of national courts in the field of multiple discrimination is sparse as well fragmented in EU region that have legal regulation of multiple discrimination. The court practice is forming and local courts investigate issues regarding multiple discriminatory grounds in six EU Member States (France, Belgium, Sweden, Poland, Latvia, and the Netherlands), where there is no legal regulation regarding the following issues.

The comparison of these cases reveals manifestations regarding issues multiple discrimination in Lithuania. The Constitutional Court is showing a clear will to investigate discrimination by several grounds. Analysis of decisions made by the Office has revealed that complaints for discrimination regarding several grounds, and, although without directly using the term of multiple discrimination in her decisions, the Ombudsperson clearly identifies discrimination on several grounds and is speaking out more boldly about multiple discrimination in the annual reports. However, it should also be noted that cases of multiple discrimination were not developed in the practice of other courts. Nevertheless, the issue of multiple discrimination must be addressed by, first of all, adopting legislative amendments with clear legal regulation of the prohibition of multiple discrimination. This would help implement equal treatment and overall protection against discrimination, guarantee the fulfillment of international obligations, as well as ensure that proportional and appropriate compensation for damages is awarded to persons who have experienced discrimination on several grounds.

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