

**Prohibition of discrimination: can a focus on intersectionality contribute to effective equality?**

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Presentation outline

Addressing discrimination from the perspective of a single ground fails to tackle adequately various manifestations of unequal treatment.

Practitioners in the field recognise, however, that addressing discrimination from the perspective of a single ground fails to capture the diversity of how people experience discrimination in their daily lives.

Intersectional discrimination describes a situation in which several grounds operate and interact with each other at the same time in such a way that they are inseparable and produce specific types of discrimination.

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FRA approach to intersectionality – 2 different angles:

1. Data collection and analysis; presentation of results:

1. Collecting and analysis of data in order to show the scale of discrimination and types of discrimination: FRA collects information on groups, on different characteristics, conducts surveys of different groups, and tries to look at how different grounds are intersecting - intersectional analysis.  
Ex. In qualitative interviews, persons often cannot say if multiple grounds played role in their situation, but in narrative it shows that they have very particular experiences based on cumulative grounds.
2. Presentation of findings and publications – disaggregation of data by different factors (including socio demographic, self-identification variables, to show different dimensions of intersectionality, beyond gender and age.)
3. Intersectional analysis provided in published reports, but also available to generate thanks to an interactive **data explorer** providing quick access to data compiled by FRA: [Data and maps | European Union Agency for Fundamental Rights \(europa.eu\)](https://european-union.europa.eu/fundamental-rights/data-explorer)

4. Examples of findings:

Regardless of legal arrangements and provisions, research data and evidence highlight that **intersectional discrimination is a recurrent reality** for many people across the EU, based on varied combinations of grounds.

- **LGBTI** - Discrimination is often multidimensional and only an intersectional approach can pave the way to sustainable and respectful changes in society.
  - the respondents in the FRA LGBTI Survey II highlight additional grounds for discrimination, with 40 % facing additional discrimination on account of being a member of an ethnic minority or having an immigrant background, 15 % on account of their skin colour, 36 % on account of having a disability and 28 % on account of religion;
  - Geographical remoteness can be an additional vulnerability factor. 47% of the LGBTI respondents across all groups in the EU live in a big city, 11% in the suburbs or outskirts of a big city, 30% in a town or small city, and 13% in a rural area.  
([A long way to go for LGBTI equality | European Union Agency for Fundamental Rights \(europa.eu\)](#))
- The results from **EU-MIDIS II** - FRA data show that people with **racial, ethnic minority or migrant backgrounds** (including Roma, Muslims, Jews and people of African descent) regularly experience high levels of discrimination based on their ethnic or racial origin as well as their religion or belief in different areas of life.  
([Second European Union Minorities and Discrimination Survey - Main results | European Union Agency for Fundamental Rights \(europa.eu\)](#))

## 2. Legal perspective: analysis of current EU and national legislation and case-law; determining gaps, formulating Opinions, supporting EU policy and law making where appropriate

### 2.1. Fundamental Rights Reports

Annual FRA's Fundamental Rights Reports reviews major developments in the field in the past year, identifying both achievements and areas of concern. It also presents FRA's opinions on these developments, including a synopsis of the evidence supporting these opinions. Developments relating to multiple and intersectional discrimination (case-law and legislative developments) are highlighted where available.

[Fundamental Rights Report 2022 | European Union Agency for Fundamental Rights \(europa.eu\)](#)

### 2.2. Handbook on European non-discrimination law – 2018 edition

The Handbook Includes a chapter on Multiple and intersectional discrimination.

[Handbook on European non-discrimination law – 2018 edition \(europa.eu\)](#)

### 2.3. EU institutions refer to FRA's findings in their policy documents and legislative proposals.

- For example, the European Parliament in its [resolution of 6 July 2022 on intersectional discrimination in the European Union: the socio-economic situation of women of African, Middle-Eastern, Latin-American and Asian descent \(2021/2243\(INI\)\)](#), refer to FRA's findings, namely:
  - FRA report of 14 May 2020 entitled 'A long way to go for LGBTI equality' (FRA LGBTI Survey II),
  - FRA report of 4 April 2019 entitled 'Second European Union Minorities and Discrimination Survey – Roma women in nine EU Member States'<sup>(12)</sup>,

– FRA report of 15 November 2019 entitled ‘Second European Union Minorities and Discrimination Survey – Being Black in the EU<sup>(13)</sup>,

#### *2.4. Intersectionality in EU law and policy (strategies vs legal protection in reality) -*

In 2020, the European Commission gave a new impetus to the equality agenda in the EU. Promoting a Union of equality, the European Commission has adopted several policy instruments: the EU anti-racism action plan 2020–2025; the EU Roma strategic framework for equality, inclusion and participation 2020–2030; the LGBTIQ equality strategy 2020–2025; the action plan on integration and inclusion 2021–2027; the EU gender equality strategy 2020–2025; the European Pillar of Social Rights action plan; and the strategy for the rights of persons with disabilities 2021–2030. **All these instruments recall the importance of mainstreaming equality in all policy areas, preventing discrimination, improving data collection and providing targeted measures for vulnerable groups. They also address intersectionality by calling for actions to tackle intersecting and multiple forms of discrimination.** In the EU anti-racism action plan, the European Commission encourages Member States to “swiftly reach an agreement on the 2008 Commission proposal to implement equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”.

However, intersectional discrimination is not protected under EU law, and only a few Member States have adopted legal provisions that pertain to either multiple or intersectional discrimination.

At the EU level, CJEU case law pertaining to intersectionality reveals a protection gap regarding intersectional discrimination in the EU equality legal framework: “Articles 2 and 6 (2) of Directive 2000/78 must be interpreted as meaning that a national rule such as that at issue in the main proceedings is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation”.

Article 2 of the Employment Equality Directive relates to the concept of discrimination, although Article 6 (2) relates to justification of differences in treatment on the grounds of age in the context of occupational social security schemes.

This protection gap is also evident in the recitals of the racial and employment equality directives, which merely state that women are often the victims of multiple discrimination.

#### *2.5. CJEU approach vs ECHR approach – examples of case-law (incl Parris case)*

Under ECHR law, both Article 14 of the ECHR and additional Protocol No. 12 prohibit discrimination on a large number of grounds, making a claim on more than one ground possible. Furthermore, the non-exhaustive list of grounds of discrimination allows the ECtHR to extend and include grounds not expressly mentioned. However, the Court does not use the terms multiple or intersectional discrimination.

Similarly to Article 14 of the ECHR, Article 21 of the EU Charter contains an open list of grounds. **Extending grounds of discrimination is, however, impossible under EU secondary law because the grounds covered by the equality directives are listed exhaustively.** The CJEU has repeatedly emphasised that it is not within its power to extend those grounds, and it has so far not invoked Articles 20 or 21 of the EU Charter to overturn this position. This means that it would not be possible to create new grounds on basis of judicial interpretation, to reflect the specific situations of discrimination experienced by certain groups.

Another possibility is to combine grounds within the existing list without regarding this as a new subgroup. However, this approach has its limitations, because the scope of each directive is different. It is difficult to establish whether the open scope of Articles 20 and 21 would allow a broader interpretation, since the CJEU has not yet referred to them in such cases.

In **Parris v. Trinity College and Others**, the CJEU had to address the possibility of intersectional discrimination, since the referring court specifically posed this question. Dr Parris requested that on his death the survivor's pension provided for by the pension scheme should be granted to his civil same-sex partner. He was refused on the basis that they entered into a civil partnership only after he had turned 60, thus not meeting the pension scheme requirements. The civil partnership, however, was established in the United Kingdom in 2009, once Dr Parris was over 60 years old; in Ireland, it was only recognised from 2011 onwards. This meant that any homosexual person born before 1 January 1951 would not be able to claim a survivor's benefit for their civil partner or spouse under this scheme. The CJEU ruled, however, that if a measure is not capable of creating discrimination on any of the grounds prohibited by Directive 2000/78/ EC – when these grounds are taken alone – then it cannot be considered to constitute discrimination as a result of the combined effect of such grounds, in this case sexual orientation and age.

*(Case C-443/15, Judgment of the Court (First Chamber) of 24 November 2016 David L. Parris v Trinity College Dublin and Others)*

This case reveals a protection gap regarding intersectional discrimination in the EU equality legal framework: “Articles 2 and 6 (2) of Directive 2000/78 must be interpreted as meaning that a national rule such as that at issue in the main proceedings is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation”.

Thus, under EU law, while discrimination may indeed be based on several protected grounds, the CJEU considered that there could be no new category of discrimination consisting of the combination of more than one of those grounds.

## 2.6. Equality bodies role

National equality laws in the EU rarely include provisions that relate to multiple or intersectional discrimination. Where this is the case, there are discrepancies between countries, as the European network of legal experts on gender equality and non-discrimination notes. The network observes, however, that, “despite limited legislative

provisions, 18 equality bodies in 17 countries identified that they had worked on issues of intersectionality”.

(European network of legal experts in gender equality and non-discrimination (2020), A comparative analysis of non-discrimination law 2019, Luxembourg, Publications Office, pp. 36–37; European network of legal experts in gender equality and non-discrimination (2018), Equality bodies making a difference, Luxembourg, Publications Office, p. 79.)

Most Member States primarily treat cases with a ‘one ground’ approach. Number of different equality bodies responsible for single grounds can contribute to undermining awareness of multiple discrimination as a legal approach to tackling discrimination.

FRA also is involved in works on EB standards and advocates opening of their mandate to deal efficiently with intersectionality, inter alia.

## 2.7. *FRA Opinion 1/2021 - EQUALITY IN THE EU 20 YEARS ON FROM THE INITIAL IMPLEMENTATION OF THE EQUALITY DIRECTIVES*

### Opinion 2

(...)

The EU and its Member States should continue exploring all possible options to unblock the negotiations on the proposed Equal Treatment Directive. Adopting the directive without further delay would remove the artificial hierarchy of grounds that has installed itself in the Union, ensuring that the EU and its Member States provide comprehensive and consistent protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation in key areas of life currently not covered by EU secondary legislation.

**The EU legislator should consider broadening the concept of discrimination to include intersectional discrimination in existing and new legislation in the area of equality and non-discrimination.** This would enable the EU and Member States to reinforce legal protection against intersectional discrimination, in particular for women who face discrimination based on the combination of different grounds of discrimination.

### Opinion 6

**To develop strategies to adequately capture situations in which different grounds of discrimination intersect or act in combination with one another – that is, multiple and intersectional discrimination – EU Member States should use a comprehensive set of equality data collection tools, including large-scale quantitative surveys covering different population groups and grounds of discrimination, alongside discrimination testing, which is an established method for generating objective evidence of discrimination.**

[Equality in the EU 20 years on from the initial implementation of the equality directives | European Union Agency for Fundamental Rights \(europa.eu\)](#)