Multiple Discrimination and EU Law: is a Horizontal Directive the Solution?

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Executive Summary

The inaction of the European Union in combatting multiple discrimination has been met with criticism from both outside and inside the intuitions of the EU. Persons or groups suffering from the synergy of more than one form of disadvantage enjoy no special statutory protections under EU law. The failure to tackle this challenge is inconsistent with the aim of attaining substantive equality and securing the effective protection of fundamental freedoms in the EU. This thesis examines the capacity of EU law to address multiple discrimination, both in its current state and in light of ongoing reforms, in particular the adoption of the European Commission's 2008 proposal for a Horizontal Directive.

The thesis first establishes a theoretical framework for understanding equal treatment laws and explores the phenomenon of multiple discrimination. The thesis then explores the primary and secondary sources of EU law to pinpoint the challenges and the opportunities presented by each in the context of multiple discrimination. To identify the past, present and future effects of EU law on national equality legislation, the thesis uses a comparative legal analysis informed by the critical examination of EU anti-discrimination law. The analysis examines the national statutory frameworks and case law produced in three EU Member States: Hungary, the United Kingdom and France. Through this analysis, the thesis aims to identify the most effective measures the EU could adopt to facilitate the fight against multiple discrimination.

The analysis concludes that EU law had ceased to be a major source of momentum for progressive equality law reforms at the national level in the period following the adoption of the Equality Directives of the early 2000s. The most promising viable opportunities for legal reform were identified in the adoption of the Horizontal Directive and the judicial extension of the scope of the Charter of Fundamental Rights. However, neither option would fully fill the gaps in EU equality law or fix the deficiencies of national statutory protections. The analysis

found that national equality protections have surpassed the minimum standards set by the EU, allowing national courts and equality bodies to address multiple discrimination cases. While remedy to individual victims is available in all three jurisdictions despite their varied statutory frameworks, there are differences among them in terms of transformative equality policies, with France lagging behind Hungary and the UK. The thesis found that UK courts, particularly labor tribunals, and the Hungarian national equality body were the most open to addressing multiple discrimination.

The thesis recommends that the EU proceed with the reform opportunities identified despite their lacking effectiveness in combating multiple discrimination, as they would be advantageous for discrimination victims nonetheless. To target multiple discrimination specifically, the thesis recommends that the EU focus on instruments with no binding legal force. The most promising options are increased support for research into multiple discrimination to help national legislators and courts better understand the phenomenon, support for the cooperation and exchange of best practices between national equality bodies, and the explicit recognition of multiple discrimination in non-binding instruments to raise awareness of the issue and encourage national bodies to address it within their own legal frameworks even in the absence of obligations to do so. At the national level, it is recommended that equality bodies receive a mandate to explicitly target multiple discrimination, as their anti-discrimination expertise combined with their consultative and monitoring responsibilities render them useful drivers of policy reform.

Introduction

According to the 2017 Europe-wide discrimination survey of the Fundamental Rights Agency of the European Union (FRA), discrimination against vulnerable groups remains endemic in Europe.[1] Discrimination on grounds such as ethnicity, color, sex, religion or age remains widespread in all walks of life, including employment, housing, education or the provision of goods and services. These inequalities adversely affect the lives of all victims, but they hit especially hard those that suffer from a multitude of disadvantages simultaneously. Individuals who possess several disadvantaging characteristics – for instance, ethnic minority migrant women – face unique challenges. This phenomenon, multiple discrimination, presents a challenge to the Member States and the institutions of the European Union (EU), which have come a long way in their fight against social injustice.

The development of the anti-discrimination framework of the EU has followed a unique trajectory. It transitioned from a means of increased market efficiency to the post-Lisbon Treaty system of pronounced fundamental rights protection.[2] The result of this winding course is an equality regime that is largely fragmented and compartmentalized, comprising both primary and secondary sources of EU law, and legal obligations of widely different scope and nature. This patchwork of a system raises challenges for equality policy across Europe. Challenges such as a *de facto* hierarchy between protected characteristics, inconsistencies between permitted justifications for discriminatory treatment, and an inability to address multiple

[1] European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey - Main Results*, EU-MIDIS II (Luxembourg: Publications Office of the European Union, 2017), http://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf.
[2] Elisabeth Holzleithner, "Mainstreaming Equality: Dis/Entangling Grounds of Discrimination," *Transnat'l L. & Contemp. Probs.* 14 (2004): 927.

discrimination at the EU level.[3] The institutions are not oblivious to the tensions in the EU anti-discrimination framework. The most notable effort to alleviate the contradictions of EU equality law was a 2008 proposal by the European Commission for a Horizontal Directive.[4] This proposed Directive was intended to equalize the level of protection between the grounds of discrimination specified in Article 19 of the Treaty on the Functioning of the European Union (TFEU). A decade later, the adoption of the 2008 proposal remains at an impasse, blocked by the Council of the European Union. Even Member States dissatisfied with the proposal have been unable to agree whether the Horizontal Directive goes too far, or indeed, does too little.[5] Although stuck in legislative limbo, the Horizontal Directive serves a useful function by virtue of the debates surrounding it: it highlights trends, strengths and failures in EU and Member State equality policies.[6]

This thesis explores whether the EU anti-discrimination framework in its current state is able to tackle multiple discrimination and examines how this aspect of EU law could be improved. As the most comprehensive reform of EU anti-discrimination policy currently on the agenda, the European Commission's 2008 proposal and the concepts that have colored the surrounding debates will provide the lenses through which the issue will be primarily explored. The analysis will reveal the direction of EU and Member State equality laws and identify both the existing challenges and the potential solutions. The thesis argues that legislative reforms currently on

[3] See e.g.: Working Group on Policy Formation, "Beyond the Labour Market: New Initiatives to Prevent and Combat Discrimination," Opinion (Brussels: Equinet, January 2008), http://www.equineteurope.org/IMG/pdf/EN_-_Beyond_the_Labour_Market_-_Opinion_2008.pdf; Colm O'Cinneide, "The Uncertain Foundations of Contemporary Anti-Discrimination Law," *International Journal of Discrimination and the Law* 11, no. 1–2 (2011): 7–28; Mieke Verloo, "Multiple Inequalities, Intersectionality and the European Union," *European Journal of Women's Studies* 13, no. 3 (August 2006): 211–28, https://doi.org/10.1177/1350506806065753.

[4] European Commission, 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, 2 July 2008.

[5] Lisa Waddington, "Future Prospects for EU Equality Law. Lessons to Be Learnt from the Proposed Equal Treatment Directive," *European Law Review* 2 (January 1, 2011): 163–84.

[6] Waddington.

the agenda are woefully inadequate in face of the challenges posed by multiple discrimination. The thesis proposes that the EU should either develop a much more ambitious legal reform plan or seek a policy-oriented, soft law solution if it aims to meaningfully engage with intersectional inequalities at the European level.

Thesis Structure

The first part of the thesis will examine the conceptual background of anti-discrimination by exploring the different conceptions of equality. The aim of this part is to introduce and explain the terms and concepts of discrimination and equal treatment used in the subsequent analysis of EU and Member State law. The chapter will underline the inadequacy of traditional formal equality in the face of challenges posed multiple discrimination in order to justify the preference of the analysis and resulting recommendations towards a robust, substantive equality-minded approach. The unique qualities of multiple discrimination and the main critiques of the traditional single-ground approach to discrimination will also be introduced.

The second part of the thesis will describe and evaluate the building blocks of EU anti-discrimination law. The aim of this chapter is to identify the gaps in both existing anti-discrimination protections and in potential legislative or judicial reforms. The chapter will outline the many prongs of EU-level anti-discrimination policy and reveal whether the Commission's proposal – as the only comprehensive anti-discrimination reform currently on the agenda – would constitute a step towards an effective equality regime in light of the equality concepts introduced in the previous chapter. By establishing the limits of EU equality law, this chapter will also help understand the synergies and discords between Community law and the statutory frameworks relied on by the Member States examined.

Finally, the third chapter will provide a comparative analysis of three Member State anti-discrimination frameworks. The analysis will assess the domestic equal treatment instruments

and the case law developed in Hungary, the United Kingdom and France, three Member States with divergent approaches to anti-discrimination both historically and in their current form. The choice of jurisdictions is justified both by the historic development and the current state of the equality regimes in these countries. France and the United Kingdom both possess equality frameworks reaching decades into the past, albeit both started from different conceptions of equality. Although both had undergone major changes since the 2000s, they have taken different directions: the UK that of centralization and cohesions, while France that of continued fragmentation and periodic reforms to a patchwork statutory regime. Meanwhile, Hungary provides a very different perspective, that of a relative newcomer to equal treatment. Hungary's equality framework is much younger than that of its counterparts, which provides an insight into the effectiveness of a system not constrained by decades of existing practices. Finally, the three states can provide an insight into the EU's effect on equality laws by virtue of their different dates of accession to the Union. France being a founder, the UK a Member State for decades and Hungary one of the more recent to accede, the three states provide a perspective into how accessions at different points of the development of the EU's equality framework contributed to legislative changes at the national level.

This analysis will reveal how implementations of EU equality law differ in Member States and what trends may be deduced from them in light of the challenges presented by multiple discrimination. The analysis will also show how the Horizontal Directive and other potential reforms outlined in Chapter 2 may transform and improve these national frameworks, if at all.

Scope and Structure

The analysis will focus primarily on the legal approach to multiple discrimination and will touch upon non-binding and policy instruments only where particularly relevant to the analysis. Temporally, the analysis will focus mainly on the statutes and case law following the adoption

of the 2000 Equality Directives, although a brief historical overview will be provided for context and a better understanding of long-term trends. The Member State jurisdictions chosen for the analysis are Hungary, the United Kingdom and France. These three Member States possess divergent anti-discrimination systems, with varying success in tackling complex forms of discrimination. The three frameworks exceed the EU obligations to different extents and in different ways. Their diverse approaches to anti-discrimination make them suitable vehicles for identifying best practices at the national level and failures at the level of EU laws.

The first section of the comparative analysis examines the statutory frameworks of the selected jurisdictions. Three main aspects of the statutes will be contrasted. First, whether the equal treatment legislation is a single statute or a combination of laws. If the statutory basis is fragmented, the analysis will examine whether the laws are separated along the prohibited grounds of discrimination or their material scope. This will help illuminate to what extent the national law follows the structure of EU law and how changes at the EU level would affect national systems. Second, it will be examined whether the Member State laws go beyond the minimum standards set by the EU. It will be examined what protected grounds and subject matters are covered by the statutes, and whether they explicitly recognize multiple discrimination. Third, the role and functions of national equality bodies as experts in discrimination will be examined. The mandates of the equality bodies will be contrasted in terms of their ability to provide individual remedy to victims of discrimination and to contribute to national policies through advocacy or monitoring and consultative roles. The first section of the comparative analysis will highlight existing trends in national anti-discrimination laws in Europe and expose existing gaps in legislations. It is against this backdrop that the effectiveness of the proposed Horizontal Directive and other potential reforms may be assessed.

In the second section of the comparative analysis, multiple discrimination case law will be examined, from both national courts and national equality bodies. It will be examined whether the reasoning in such cases acknowledges the concept of multiple discrimination and if the courts and equality bodies analyze the unique situation of multiply disadvantaged individuals, or, conversely, if they limit their analysis to a single ground. In this context the use of comparators will likewise be contrasted. Second, the analysis will examine to what extent instruments of EU law are referenced in the reasonings. The second part of the comparative analysis will therefore demonstrate to what extent national judicial and quasi-judicial bodies use their powers to fill gaps in equality laws if at all, and to what extent EU laws may influence litigation outcomes as tools of interpretation, rather than simply through the binding legal effects they impose after transposition.

1. Multiple Inequalities, Uniform Solutions

The concept of equality is a complex one. It presents legal, policy-based and theoretical challenges alike. To understand how effective an anti-discrimination framework is, first it must be established what equality actually entails. The anti-discrimination framework of the European Union currently encompasses a remarkable number of grounds, from the more traditional sex, race or religion to the less commonly protected genetic features and social origin.[7] However, a broad personal or material scope alone does not guarantee that a policy will be able to tackle the social realities of discrimination. As such, an analysis of the effectiveness of these policies should go beyond the scope of the protections offered and address the fundamental notions of equality the policies express.

[7] European Union, Charter of Fundamental Rights of the European Union. 26 October 2012. OJ C 326/02, 391, Art. 21.

The aim of this chapter is to explore the theoretical notions necessary for the evaluation of equality instruments. First, the concept of substantive equality will be introduced and contrasted with formal equality. The concepts and policy measures encompassed by substantive equality will be highlighted, including their contribution to addressing the causes and consequences of discrimination. Then, the question of multiple discrimination will be explored to demonstrate the interplay between inequalities and show the weaknesses of the traditional single-ground approach. This theoretical framework will inform the analysis of both EU and Member State instruments in terms of their intended and actual outcomes.

1.1. Substantive Equality

The concept of equality is highly contested. The most basic interpretation of the notion is that of formal equality.[8] This doctrine espouses the concept that likes should be treated alike, meaning that laws or practices must refrain from differentiating between individuals in a comparable situation. Formal equality recognizes equality as a matter of consistency, viewing the differential treatment between comparable individuals itself as the source of injustice.[9] This concept of equality is process-based in nature, as it examines the fairness of laws, policies and practices from a superficial perspective. Formal equality analysis is constricted to the specific measure under examination, with no regard for the broader social context. The result of this superficial perspective is that formal equality is unable to account for facially neutral policies that nonetheless reinforce inequalities stemming from power imbalances in society. The doctrine of formal equality attracts criticism for its inability to enact social change, as it is not capable of – or indeed, intended to – achieve any redistribution of resources or power in

[8] Johanna Croon-Gestefeld, *Reconceptualising European Equality Law: A Comparative Institutional Analysis*, vol. 69, Modern Studies in European Law (Oxford: Hart Publishing, 2017).
[9] Sandra Fredman, *Discrimination Law*, 2nd edition, Clarendon Law Series (Oxford: Oxford University Press, 2011).

society.[10] Formal equality therefore offers no solution to entrenched inequalities that would require targeted differential treatment.

A further criticism of formal equality is that it entails conformist tendencies.[11] These tendencies flow from the philosophy of treating likes alike, which necessarily places the individual in the focal point. For this individualist analysis, a comparator must be identified, in relation to whom the unequal treatment may be established. As such, formal equality policies are best suited for protecting individuals that largely conform to the norms of society. In contrast, individuals possessing multiple disadvantaging characteristics fall outside the scope of formal equality-based scrutiny. As will be shown in the following chapter, EU equality instruments primarily follow this interpretation of equality, at least insofar as binding legal obligations are concerned.

In contrast with formal equality stands the notion of substantive equality, which is often termed "*full equality in practice*" in the EU context.[12] Substantive equality entails a more complex and diffused concept. As Fredman notes, substantive equality has a highly contested meaning due to this complexity.[13] The two main strands of substantive equality are equality of results and equality of opportunity. Equality of results essentially prescribes a fair distribution of burdens and goods, which requires the continued privileging of disadvantaged groups until such a point when equality has been achieved.[14] This may be accomplished through positive action measures, such as hiring quotas or social benefits targeted at specific groups. Its counterpart is the equality of opportunities, which adds a level of personal responsibility to the equation by

[10] Croon-Gestefeld, *Reconceptualising European Equality Law*.
[11] Sandra Fredman et al., *Intersectional Discrimination in EU Gender Equality and Non-discrimination Law* (Luxembourg: Publications Office of the European Union, 2016), http://bookshop.europa.eu/uri?target=EUB:NOTICE:DS0116393:3A:HTML.
[12] Bob Hepple, *Equality: The Legal Framework*, 2nd edition (Oxford: Hart Publishing, 2014), 25.
[13] Fredman et al., *Intersectional Discrimination in EU Gender Equality and Non-discrimination Law*.
[14] Croon-Gestefeld, *Reconceptualising European Equality Law*.

acknowledging differences in merit between individuals.[15] According to Fredman, effective substantive equality policies must comprise four elements: they must redress existing disadvantages, they must address stereotyping and violence, they must transform structures in society and economy to accommodate differences, and they must facilitate the participation of individuals that belong to vulnerable groups.[16] McCrudden has likewise identified four forms of equality that must be implemented for a comprehensive substantive approach to be successful. In McCrudden's analysis, these forms of equality are (1) individual justice, which essentially reflects the formal equality approach; (2) group justice, aimed at redistribution in line with the equality of results approach; (3) protecting and enhancing identities, including not only religious, ethnic or cultural identities but also those of certain disabled groups; and finally (4) equality as participation, which aims to prevent the exclusion of vulnerable groups from the policymaking process.[17]

Despite the different understandings, there are two common threads found in all interpretations of substantive equality. First, the aim of eliminating existing inequalities and enacting progressive social change. Second, the necessity of recognizing the different starting points for various vulnerable groups. It follows that the goal of substantive equality cannot be achieved without duly comprehending the origins and the functioning of the various inequalities disadvantaging minority groups, including the subtle ways in which these inequalities continue to affect lives and to be reproduced by social and/or economic relations.

In practical terms, substantive equality policies fall into the categories of positive action or mainstreaming. In the typology of Theresa Rees, these policies are labelled *tailoring* and *fitting*,

[15] Croon-Gestefeld.
[16] Fredman et al., *Intersectional Discrimination in EU Gender Equality and Non-discrimination Law*.
[17] Christopher McCrudden, "Thinking about the Discrimination Directives," *European Anti-Discrimination Law Review*, no. 5 (April 2005): 17–21.

respectively, in contrast with the *tinkering* of formal equality.[18] The terminology of Rees helpfully highlights the way these practices approach inequality. Positive action interferes with policies to provide specific advantages to members of underrepresented or generally disadvantaged groups until a quantifiable goal is achieved. Such goals could be proportionally equitable representation for women or ethnic minorities at an institution, or increasing minority enrolment in education. This means that positive action measures are aimed at groups rather than the individual. However, they are by definition temporary, linked to the attainment of a specific, quantifiable goal, rather than at changing power structures. Mainstreaming, on the other hand, is intended to be truly transformative. In the definition of the European Commission, mainstreaming involves "*mobilising all policies and measures specifically for the purpose of achieving equality*."[19] The aim of mainstreaming is therefore fundamentally changing the way policy is constructed, changing institutions, norms and structures in society. In contrast with positive action, it is not a temporary measure but a complex, long-term solution. Mainstreaming therefore further broadens the target of the policy from groups to society.

The goal of attaining substantive equality in the European Union is affirmed by the inclusion of both positive action and mainstreaming in the equal treatment policy arsenal of the EU. Positive action is permitted – though not mandated – in equality instruments ranging from Directives to the Charter of Fundamental Rights of the EU (CFREU), the *de facto* bill of rights of the EU. Likewise, the aim of combatting indirect forms of discrimination is explicitly proclaimed by all EU equality instruments. Substantive equality measure furthermore appear

[18] Teresa Rees, *Mainstreaming Equality in the European Union: Education, Training and Labour Market Policies* (London: Routledge, 1998).
[19] Niall Crowley, *Compendium of Practice on Non-Discrimination/Equality Mainstreaming* (Luxembourg: Publications Office of the European Union, 2011), 8, https://publications.europa.eu/en/publication-detail/-/publication/1c934780-2913-4061-a2be-7a86a33279c6.

in the constitutional basis of the EU, namely in Articles 3 and 10 TFEU on the mainstreaming of the grounds of discrimination recognized by the Treaties.[20] It is in light of this implicit recognition of the substantive equality doctrine that the effectiveness of EU equal treatment law should be measured.

1.2. Multiple Discrimination

Understanding multiple and intersectional discrimination is necessary to fully comprehend the concept of substantive equality. The idea of intersectional discrimination was developed in the late 1980s by black feminist scholar Kimberlé Crenshaw, and was subsequently adopted by other feminist thinkers, and other scholars concerned with equality.[21] Crenshaw argued that the experiences of black women are distinct from the aggregate experiences of white women and black men, the standard groups representing gendered and racial inequality in the US. The central concept behind multiple discrimination – or intersectionality – is that certain inequalities may intersect in ways that create uniquely discriminatory situations that cannot be appropriately understood through the examination of the individual statuses of the victim of discrimination. Certain strands of discrimination are therefore understood as being "*mutually constitutive.*"[22] Depending on the level of interaction between the various grounds of discrimination that apply, situations including multiple grounds may be described as sequential, compound or intersectional.[23] The first describes a situation in which discrimination on the different grounds occurs simultaneously but independently of each other, the second a

[20] Victoria Chege, "The European Union Anti-Discrimination Directives and European Union Equality Law: The Case of Multi-Dimensional Discrimination," *ERA Forum* 13, no. 2 (August 2012): 275–93, https://doi.org/10.1007/s12027-012-0260-1.
[21] European Commission, ed., *Tackling Multiple Discrimination: Practices, Policies and Laws* (Luxembourg: Office for Official Publications of the European Communities, 2007).
[22] Emanuela Lombardo and Mieke Verloo, "Institutionalizing Intersectionality in the European Union?: Policy Developments and Contestations," *International Feminist Journal of Politics* 11, no. 4 (December 2009): 479, https://doi.org/10.1080/14616740903237442.
[23] European Commission, *Tackling Multiple Discrimination*.

situation where the effects of various inequalities combine to create less favorable treatment, while the third a situation where inequalities synergistically unite to create a unique situation. Fredman notes that such distinctions are not clearly defined in the literature or policies, the terms often being used interchangeably.[24]

While the concept of multiple discrimination was initially developed in the context of gender and race in the US, it can be equally applied to the grounds covered by EU and Member State legislation. The European Commission itself has recognized how grounds of discrimination covered by EU law, such as age, gender, ethnicity or disability may interact to produce unique situations.[25] A practical example is how the traditionally lower enrolment of women in employment, combined with a higher likelihood of taking part-time employment due to caregiving responsibilities results in women over the age of 65 facing a substantially higher risk of poverty and social exclusion than male counterparts or younger women.[26] In this example, the women suffer inequality due to the historically different position of women. Their status is distinct both from that of younger women experiencing lower levels of disengagement from the workforce and that of older men who possess more work experience due to their historically favored position. The Fundamental Rights Agency of the EU has furthermore found that such intersectional discrimination occurs in Europe not only among the elderly but also among the younger population, young ethnic minorities being more at risk of discriminatory stereotyping.[27] Examples of two or more grounds of discrimination intersecting in unique ways are plentiful.

This complex form of discrimination poses a challenge for legal systems because equality statutes often use a single-ground approach. In practice, this means that legal systems are not

[24] Fredman et al., *Intersectional Discrimination in EU Gender Equality and Non-discrimination Law*.
[25] Fredman et al.
[26] Fredman et al.
[27] Fredman et al.

suited to examine situations where more than one ground of discrimination is involved. The prevalence of the single-ground approach may be explained by both legal pragmatism and the historical development of various equality movements, which recognized the significance of highlighting their particular inequalities and suffering.[28] As Verloo argues, a uniform approach to inequalities erroneously assumes a high degree of similarity between the inequalities.[29] At the same time, while understanding specific inequalities and providing solutions tailored to them can be beneficial, it should not result in a restrictive single-ground approach that disadvantages victims of multiple discrimination. The single-ground or single-axis approach ignores the multitude of identities an individual may possess and assumes that the demarcated groups are distinct and internally homogenous.[30] This essentialism shrouds the needs of multiply disadvantaged groups. For instance, the recognition of the less favorable treatment of part-time workers as indirect sex discrimination ignores the fact that black women are much more likely than white women to be working full-time.[31] In this example, improving the status of part-time employed women would not significantly better the situation of black women. The inability to understand the intricacies entailed in the simultaneous presence and interaction of multiple disadvantaging factors harms the effectiveness of courts and legislators alike in tackling discrimination.

Aside from limiting the availability of legal remedy, the single-ground approach negatively affects the collection of reliable data on inequalities. Studies of case law show that most

[28] Iyiola Solanke, "Putting Race and Gender Together: A New Approach to Intersectionality," *The Modern Law Review* 72, no. 5 (September 1, 2009): 723–49, https://doi.org/10.1111/j.1468-2230.2009.00765.x.
[29] Verloo, "Multiple Inequalities, Intersectionality and the European Union."
[30] Isabelle Carles et al., "The Use of Racial Antidiscrimination Laws: Gender and Citizenship in a Multicultural Context" (GendeRace, June 2010), http://genderace.ulb.ac.be/rapports/GENDERACE%20FINAL%20REPORT%20sent.pdf.
[31] Sarah Hannett, "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination," *Oxford Journal of Legal Studies* 23, no. 1 (March 1, 2003): 65–86, https://doi.org/10.1093/ojls/23.1.65.

discrimination victims submit their claims under a single ground, even in jurisdictions where multiple discrimination claims are theoretically permitted.[32] The reasons for this can range from the preferences of legal practitioners to the lack of information available to victims. Regardless of the causes however, this trend means that studies aiming to evaluate the effectiveness of existing legal remedies for victims of multiple discrimination are deprived from a valuable source of data. The effects of the single-ground approach to discrimination in practical terms will be examined in the comparative analysis in Chapter 3.

1.3. Chapter Conclusions

Substantive equality and the tackling of multiple discrimination go hand in hand. For this reason, the goal of substantive equality requires a nuanced approach willing to go beyond the individualistic and process-based notion of formal equality. Due to its conformist nature and dependence on comparators, formal equality cannot address multiple or intersectional discrimination. At the same time, substantive equality – whether understood as equality of results or opportunities – cannot be achieved without due regard to the elimination of multiple discrimination, the form of inequality affecting the most disadvantaged elements of society. The endorsement of positive action and gender mainstreaming by the European Union shows a trend in Europe towards the substantive equality approach. However, to achieve substantive equality, measures addressing multiple or intersectional discrimination must be added to the equation and extended to all statuses. Desirable equality instruments must fulfill many criteria, and be able to address discrimination at individual, group and societal level.

It is also clear that efforts to combat inequality must simultaneously permit lawmakers and courts to address the unique qualities of various inequalities and prevent the imposition of a

[32] Carles et al., "The Use of Racial Antidiscrimination Laws: Gender and Citizenship in a Multicultural Context."

strict single-axis framework that forces victims to strategically choose between their identities. These dual needs are somewhat contradictory, requiring on the one hand specific solutions tailored to specific grounds, and on the other hand requiring a large measure of flexibility that allows them to fit the multitude of situations the additive or synergistic effect of two or more grounds of disadvantage may create.

2. Multiple Discrimination and EU Law

The anti-discrimination regime of the European Union is highly fragmented. The jigsaw of European anti-discrimination is comprised of instruments such as Directives, the Charter of Fundamental Rights, the Treaties and general principles of EU law. Additionally, it includes international human rights instruments in various ways: the EU has ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) and the jurisprudence of the European Court of Human Rights (ECtHR) is recognized by the Treaties.[33] The various instruments fulfill complementary roles but ultimately fail to successfully address many of the issues related to substantive equality and multiple discrimination.

The goal of this chapter is to provide an overview of the anti-discrimination instruments of the European Union and to analyze the ways in which they interact with and complement each other. Additionally, the analysis will consider what realistic reforms may fill the existing gaps based on the trends in legislation and the case law of the Luxembourg Court. This will provide the necessary background to assess how the 2008 Commission proposal for the Horizontal Directive would fit into and transform the system and what better or more viable alternatives exist. The assessment of these instruments, including the outlining of possible reforms, will

[33] "Treaties Office Database," European External Action Service, accessed April 24, 2018, http://ec.europa.eu/world/agreements/searchByType.do?id=2.

also provide the necessary backdrop for the subsequent evaluation of Member State equality laws and practices.

2.1. The European Convention of Human Rights

With the entry into force of the Lisbon Treaty, the European Union gained legal personality.[34] This change carried considerable ramifications for its human rights regime, since the newly acquired legal personality permitted the EU to accede to international agreements. For the first time since its foundation, the EU could become party to the framework of international human rights conventions thus far only available to the individual Member States. The significance of this direct participation is not only symbolic, as it greatly advanced the legal integrity and coherence of the Union. To date, the EU has only ratified a single human rights treaty, the UN CRPD. However, in the present context, a treaty the EU has not yet acceded to is of greater import: the European Convention of Human Rights (ECHR).

Article 6(2) of the Treaty on European Union (TEU) prescribed the accession of the EU to the ECHR. While the accession has not been realized to date, the ECHR continues to play a role in EU law. According to the Luxembourg Court, Directives are to be interpreted with due regard for the Convention, and due to Article 6(3) TEU, the ECHR constitutes a source of general principles of law.[35] A further connection established between the two systems is Article 52(3) CFREU, which – in order to avoid conflicts between the jurisdictions – links the interpretation of Charter rights to corresponding Convention rights. The failure of the EU to ratify the ECHR poses a challenge to legal coherence. The two European courts have already

[34] European Union, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 17 December 2007, OJ C 306, 1, Art. 47.
[35] Paul Craig and Gráinne de Búrca, *The Evolution of EU Law* (Oxford: Oxford University Press, 2011).

clashed on human rights standards, although not in the realm of equal treatment.[36] However, the vagueness of the scope of EU Charter of Fundamental Rights may very well lead to further conflicts.[37]

Conflicts of the jurisdictions have avoided the area of equal treatment thus far. This does not mean however that there are no considerable differences between the anti-discrimination framework of the EU and the Convention. The ECHR applies a much broader standard of equal treatment: Article 14 of the Convention uses a non-exhaustive list of prohibited grounds of discrimination, which may protect any characteristic distinguishing individuals or groups.[38] Furthermore, Protocol No. 12 ECHR extends the non-discrimination provision to all legal rights. The broadness of the Convention right to equal treatment is demonstrated especially in *Rasmussen v. Denmark*, where the ECtHR found it unnecessary to determine the specific ground of discrimination due to the fact that Article 14 is non-exhaustive.[39] As Article 14 combined with Protocol No. 12 covers all personal characteristics and all rights granted by law, the Convention system could provide a glimpse into the future of an EU framework constructed horizontally. However, in reality the Strasbourg Court has been reluctant to deal with unconventional forms of discrimination. Even in the field of single-ground discrimination, the ECtHR has been slow to address statuses covered even by the EU Equality Directives. For instance, age, a characteristic not explicitly protected by Article 14 was read into the Convention rather late. It was not until the 2011 judgement in *Schwizgebel v. Switzerland* that

[36] ECtHR, M.S.S. v. Belgium and Greece, no. 30696/09, 21 January 2011; CJEU, N. S. v. Secretary of State for the Home Department and M. E. and Others, C-411/10, 21 December 2011, ECLI:EU:C:2011:865.
[37] Constanze Semmelmann, "General Principles in EU Law between a Compensatory Role and an Intrinsic Value: General Principles of EU Law," *European Law Journal* 19, no. 4 (July 2013): 457–87, https://doi.org/10.1111/eulj.12044.
[38] J. Gerards, "The Discrimination Grounds of Article 14 of the European Convention on Human Rights," *Human Rights Law Review* 13, no. 1 (March 1, 2013): 99–124, https://doi.org/10.1093/hrlr/ngs044.
[39] Gerards.

age was recognized as a protected status by the ECtHR.[40] The age discrimination jurisprudence of the Strasbourg Court remains lacking, revealing the unwillingness of the ECtHR to develop a more robust equal treatment jurisprudence.[41] Instead, the ECtHR will often refuse to examine the merits of a discrimination claim when a violation can be established under a different substantive right.[42]

In light of the above, it is unsurprising that the ECtHR has not addressed multiple-ground discrimination directly. The broad scope of the ECHR equality provisions theoretically permits the Strasbourg Court to approach intersectional discrimination either through reading intersecting grounds (such as elderly women) into the Convention or the recognition of the effect produced by the presence of multiple disadvantaging personal characteristics in a case. The ECtHR has failed to do either to date, despite having ruled in cases with obvious intersectional elements. This unwillingness to address intersectionality has been decried by Judge Albuquerque, who noted in a dissenting opinion that the Court refuses to explicitly recognize the concept of intersectionality despite it not being fully foreign to its jurisprudence.[43] For instance, in *B.S. v. Spain*, the Court acknowledged the "*particular vulnerability*" of an "*African woman working as a prostitute.*"[44] In another recent case, the Court was faced with an intersectional claim constructed along the lines of age and sex. In *Carvalho Pinto de Sousa Morais v. Portugal*, the Applicant was a victim of medical negligence

[40] European Union Agency for Fundamental Rights and European Court of Human Rights, eds., *Handbook on European Non-Discrimination Law*, 2018 edition (Luxembourg: Publications Office of the European Union, 2018), https://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG.pdf.
[41] Elise Muir, "Fine-Tuning Non-Discrimination Law: Exceptions and Justifications Allowing for Differential Treatment on the Ground of Age in EU Law," *International Journal of Discrimination and the Law* 15, no. 1–2 (March 2015): 38–61, https://doi.org/10.1177/1358229114558387.
[42] Adrienne Komanovics, "Old-Age Discrimination: The Age-Blindness of International Human Rights Law," *Hungarian YB Int'l L. & Eur. L.*, 2013, 217.
[43] ECtHR, Garib v. the Netherlands, no. 43494/09, 6 November 2017.
[44] ECtHR, B.S. v. Spain, no. 47159/08, 24 July 2012, § 62-

who received a lower amount of compensation compared to males in an analogous situation.[45] The domestic court in that case argued that older women are affected to a lower extent by damage to reproductive organs. The ECtHR affirmed that the Applicant suffered discrimination on the basis of both her age and sex but has failed to apply an explicitly intersectional analysis.[46] As the ECtHR waited until 2007 to acknowledge the concept of indirect discrimination, perhaps it is only a matter of time until the Strasbourg Court takes up the mantle of addressing multiple discrimination.[47] Based on existing case law however, this possibility remains in the realm of speculation.

In sum, while the Convention fulfills a complementary role to the EU equality framework, the reluctance of the ECtHR to address discrimination in general has reduced its potential to develop a broad, horizontal equality regime capable of tackling complex forms of discrimination. In this regard, it is difficult to predict to what extent the ratification of the Convention by the EU would affect the equality jurisprudence of the Court of Justice of the EU (CJEU), if at all. Perhaps the accession would invigorate the Strasbourg Court, as its newly binding power over the EU would dissipate the uncertainties surrounding conflicts between the two European Courts. With its status as the ultimate European human rights forum cemented, the ECtHR may assume a more activist and progressive approach, engaging with equality concepts currently avoided. Regardless of the potential effects of the mandated accession however, the ratification is unlikely to come to fruition. While the accession is prescribed at the Treaty level, so is its primary hurdle. Protocol No. 8 TEU proclaimed that the accession shall not affect the powers of the EU or its institutions.[48] It is along the same line that the CJEU

[45] ECtHR, Carvalho Pinto de Sousa Morais v. Portugal, no. 17484/15, 25 July 2017.
[46] ECtHR, Carvalho Pinto de Sousa Morais v. Portugal, no. 17484/15, 25 July 2017 § 53.
[47] ECtHR, D.H. and Others v. Czech Republic, no. 57325/00, 13 November 2007.
[48] Mańko Rafał, "EU Accession to the European Convention on Human Rights (ECHR)," Briefing (Brussels: European Parliamentary Research Service, July 2017), http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607298/EPRS_BRI(2017)607298_EN.pdf.

has formulated its post-Lisbon opinion on the impossibility of the ECHR ratification by the Union.[49] Opinion 2/13 rejected the possibility that the CJEU may cease to be the final arbiter of EU law, blocking the accession in a bid to protect its current position as the ultimate judicial authority in the Union.

2.2. The Equality Directives

The backbone of current EU equal treatment protection is the mosaic of so-called Equality Directives adopted in and after 2000. The Equality Directives can be traced back to the Treaty of Amsterdam,[50] which in its Article 13 (now Article 19 TFEU) extended the competences of the EU to legislate in the area of anti-discrimination.[51] The expanded competences now allowed the EU to legislate on the grounds of sex, race or ethnic origin, religion or belief, disability, age and sexual orientation. The result of the extended competences was a complete overhaul of the directive-based regime. In 2000, two new directives were adopted to cover the grounds previously absent: the Race Equality Directive covering the grounds of race and ethnic origin, and the Employment Equality Directive covering religion and belief, disability, age and sexual orientation.[52] The reform reached the already well-established prohibition of sex discrimination as well with the adoption of the 2004 Goods and Services Directive and the 2006 Equal Treatment Directive.[53] For the purpose of understanding the impact of the proposed Horizontal

[49] CJEU, "Opinion 2/13," December 18, 2014, http://curia.europa.eu/juris/liste.jsf?num=C-2/13.
[50] European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997, OJ C 340, 115.
[51] Ann Numhauser-Henning, "The EU Ban on Age-Discrimination and Older Workers: Potentials and Pitfalls," *International Journal of Comparative Labour Law and Industrial Relations* 29, no. 4 (2013): 391–414.
[52] European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, 22; European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 16.
[53] European Union, 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 service, OJ L 373, 37; European Union, 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), OJ L 204, 23.

Directive, the Race Equality Directive and the Employment Equality Directive need to be examined in more detail, as the 2008 proposal is aimed at leveling up the protections offered by the latter to match those of the former.

The two Directives were adopted the same year that the Charter was solemnly proclaimed, essentially giving legal expression to its non-discrimination principles. Despite being adopted at the same time, policies relating to the various grounds were not equally rooted in previous legislation. Race and ethnicity had already been addressed in Joint Action 96/443/JHA, as cited in Recital 11 of the Race Directive. In contrast, age for instance was particularly late to the legislative agenda.[54] Of course, the contrast does not end at the legislative background: the two main differences between the Directives are their fundamentally different scope and the permitted justifications, which are responsible for the *de facto* hierarchy between the protected grounds. The most obvious difference is one the 2008 Commission proposal aims to eliminate, namely that the Employment Equality Directive does not apply outside the field of employment relations. The relative weakness of the Employment Equality Directive has been acknowledged by the European Commission, which ascribed the difference to the greater political will at the time for race equality legislation, which the Race Directive capitalized on.[55] The political circumstances of the adoption of the Race Directive were the election of Jörg Haider's far right FPÖ party in Austria, which raised fears or fundamental rights backsliding.[56] Understandably, concerns were raised particularly with regards to the situation of ethnic minorities under the new Austrian government, creating a demand for a symbolic reaction from the EU and the

[54] Elaine Dewhurst, "Equality in an Economic Crisis: Re-Writing Age Discrimination Legislation," in *Citizenship and Solidarity in the European Union: From the Charter of Fundamental Rights to the Crisis, the State of the Art*, ed. Alessandra Silveira, Mariana Canotilho, and Pedro Madeira Froufe (Brussels: P.I.E. Peter Lang, 2014), 125–39.
[55] Mark Bell, "Advancing EU Anti-Discrimination Law: The European Commission's 2008 Proposal for a New Directive," *The Equal Rights Review* 3, no. 8 (2009).
[56] Virginie Guiraudon, "Equality in the Making: Implementing European Non-Discrimination Law," *Citizenship Studies* 13, no. 5 (October 2009): 527–49, https://doi.org/10.1080/13621020903174696.

other Member States. In that sense, the Race Directive is an outlier among the Directives, its broad scope having been made possible by political urgency.

An additional peculiarity of the Employment Equality Directive is its inclusion of multiple unrelated prohibited grounds: religion, disability, sexual orientation and age. The significance of this is that the above-mentioned hierarchy of grounds exists not only between the various Directives, but also between the characteristics protected within the Employment Equality Directive. Age in particular enjoys limited protections due to the broad range of permissible justifications. The age equality framework of Directive 2000/78 may even be termed a "*semi-equality model,*" particularly due to the justification outlined in Article 6 of the Directive.[57] Articles 6 of the Directive complements the general justifications outlined in Article 2 on objectively justified legitimate aims and Article 4 on genuine occupational requirements. Article 6 permits deviation from the non-discrimination principle in the presence of legitimate employment policy or vocational training aims, and pension schemes, provided that it does not result in sex discrimination.

A final weakness of the Employment Equality Directive is the absence of a requirement to establish national equality bodies. Article 13 of Directive 2000/43, stipulates that Member States be obligated to designate equality bodies mandated to provide assistance to victims of discrimination, monitor the state of affairs and submit recommendations regarding any pertinent issue. The Employment Equality Directive contains no equivalent provision, depriving the four grounds covered from such institutional empowerment. This could pose a particular challenge for addressing multiple discrimination at the level of equality bodies, as Member States have discretion to decide whether their national equality body or bodies should

[57] Dewhurst, "Equality in an Economic Crisis: Re-Writing Age Discrimination Legislation," 131.

be mandated to cover religion, sexual orientation, disability and age in their activities.[58] As will be demonstrated in the following chapter, quasi-judicial equality bodies may be more inclined to address multiple discrimination even in legal environments permitting judicial bodies to do the same. This means that the absence of the equality body requirement in Directive 2000/78 can harm the interests of multiple discrimination victims.

Since none of the Equality Directives address multiple discrimination outside the non-binding recitals, very few Member States have enacted legislation specifically addressing multiple discrimination.[59] It is unsurprising perhaps that legislatures and judicatures are reluctant to engage with such a complex issue without external pressure to do so. However, this only makes the broadening of equality body competences all the more important. It should be noted in this regard that although the Directives suffer from the lack of consistency regarding equality bodies, most Member States have taken the initiative to empower their equality bodies to address characteristics and fields not required by EU law. According to Equinet, most Member State equality bodies possess general and fully horizontal mandates, covering all six Article 19 TFEU grounds and all spheres of public life.[60]

2.3. The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union was solemnly proclaimed in 2000. While initially not binding, it had a symbolic role as a comprehensive bill of rights for the European Union, codifying the fundamental rights and freedoms previously enshrined in statutes, general principles, constitutional traditions and the case law of the ECtHR and the

[58] European Commission, *Tackling Multiple Discrimination*.
[59] Gay Moon, "Multiple Discrimination: Justice for the Whole Person," *Roma Rights* 2 (2009): 5–10.
[60] "Equinet Members," Equinet Europe, accessed December 17, 2017, http://www.equineteurope.org/spip.php?page=tableau_neb&section=grounds.

CJEU. With the entry into force of the Lisbon Treaty, the Charter was elevated to the same level as the Treaties.[61] During its initial drafting, the primary concern was ensuring that the Charter would bind the institutions of the EU, while its effect at the Member State level was afforded lower importance.[62] The effect of the Charter on the Member States is limited by Article 51(1), which states that the provisions of the Charter apply "*to the Member States only when they are implementing Union law.*" The Member States therefore operate as "*decentralized agents of the Union*" when implementing legislation adopted by the EU.[63] The principle of subsidiarity is additionally expressed in Article 53, which restricts the Charter's scope in cases where national constitutions provide equal or higher protection. Despite this severely restricted scope of application, the significance of the Charter in the field of non-discrimination should not be underestimated. The broad material scope of Article 21 on non-discrimination extends far beyond the six Article 19 TFEU grounds. Article 21(1) employs an open-ended list that explicitly names the grounds of "*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.*" It is also noteworthy that unlike the Equality Directives, the Charter non-discrimination provision is not limited to any particular sphere of public life, such as employment or education.

Additionally, under Chapter III on equality, the Charter contains special provisions for multiple statuses already covered by the general non-discrimination clause of Article 21. These provisions include protections for cultural, religion and linguistic minorities (Article 22), men

[61] TEU Art. 6(1)
[62] Klaus Stern, "The Binding Force and Field of Application of the Fundamental Rights Enshrined in the Charter of Fundamental Rights of the European Union," in *Common European Legal Thinking*, ed. Hermann-Josef Blanke et al. (Cham: Springer, 2015), https://doi.org/10.1007/978-3-319-19300-7.
[63] Jean-Paul Jacqué, "The Charter of Fundamental Rights and the Court of Justice of the European Union: A First Assessment of the Interpretation of the Charter's Horizontal Provisions," in *The EU after Lisbon: Amending or Coping with the Existing Treaties?*, ed. Lucia Serena Rossi and Federico Casolari (Cham: Springer, 2014), https://doi.org/10.1007/978-3-319-04591-7.

and women (Article 23), children and old people (Arts. 24 and 25) and disabled people (Article 26). These provisions are more than a symbolic redundancy aimed at reinforcing the protection of certain groups. Articles 25 and 26 in particular complement the basic non-discrimination approach of Article 21 through wording that suggests a more comprehensive, substantive equality-minded policy by recognizing the importance of dignity, independence, and participation and integration in the community and the workforce. While these provisions are still much less specific than secondary EU law, they are sufficiently precise to show that the scope of the Charter extends far beyond the subject matters covered by the Equality Directives. The Charter is therefore more reminiscent of the ECHR jurisprudence and its Article 14 than other EU equality instruments. It may become a formidable instrument in the pursuit of equal treatment due to its extensive equality provision, as long as its scope of application is sufficiently extended. As the Charter is straddled with uncertainties regarding its application, the vagueness of certain provisions and the somewhat contradictory case law of the CJEU, it is necessary to examine the three relevant areas of confusion: the distinction between rights and principles, the horizontal effect and the scope of application of the Charter.

Article 52(5) of the Charter states that provisions containing principles, rather than rights, are only judicially cognizable during the interpretation of acts giving them specific legal expression. This provision creates terminological and legal confusion. Terminological confusion arises due to the fact that principles in the jargon of the Charter are distinct from the general principles of EU law applied by the CJEU. The distinction is substantial, as only the latter may form the basis of legally enforceable claims.[64] The legal confusion is caused by the lack of a definitive list of the provisions containing principles, and the absence of a workable framework for the assessment of whether a specific provision is to be interpreted as a right or

[64] Semmelmann, "General Principles in EU Law between a Compensatory Role and an Intrinsic Value."

a principle. The explanatory memorandum of the Charter provides little assistance here, as it lists only some of the principles, adding that certain provisions may contain elements of both rights and principles.[65] The vagueness of the distinction between enforceable rights and normally non-enforceable principles muddies the interpretation of the Charter, which runs counter to its aim of increasing the visibility of fundamental rights.[66]

After addressing the general enforceability of the Charter provisions, it is appropriate to examine an essential aspect of the Charter connected to the precision of its provisions, namely whether they may have horizontal direct effect. The Luxembourg Court established the criteria whereby Treaty provisions may have direct effect in the seminal cases of *Van Gend & Loos* and *Costa*.[67] The two criteria to be met were defined as sufficient precision and unconditionality. This means that Treaty provision fulfilling these requirements confer enforceable rights upon individuals, allowing them to invoke these rights in front of national courts even in the absence of specific implementing statutes. As the Lisbon Treaty elevated the Charter to the level of the Treaties, the same doctrine became applicable to the Charter.[68] This raises the possibility of the Charter's non-discrimination provision attaining horizontal direct effect, meaning that it would be applicable between private parties in national courts – a scope of application that would far supersede both existing EU equality instruments and Article 14 ECHR.

[65] "Explanations Relating to the Charter of Fundamental Rights," *Official Journal of the European Union* C 303 (December 14, 2007): 17–35.
[66] Cian C. Murphy, "Using the EU Charter of Fundamental Rights against Private Parties after Association de Médiation Sociale," *Browser Download This Paper*, 2014.
[67] Lucia Serena Rossi, "'Same Legal Value as the Treaties'? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights" 18, no. 4 (2017): 772–98.
[68] Frantziou Eleni, "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality," *European Law Journal* 21, no. 5 (September 1, 2015): 657–79, https://doi.org/10.1111/eulj.12137.

The question of horizontal application is not addressed in the Charter, and so the doctrine had to be developed by the Court of Justice. In *Kücükdeveci*, the Court found that the general principle of EU law on non-discrimination on the ground of age, as given expression by Directive 2000/78 and Article 21(1) of the Charter, is sufficient to confer rights to individuals in horizontal situations.[69] This judgment raised questions regarding the standards for horizontal application that have not been duly clarified to date. CJEU decisions since *Kücükdeveci* have tended towards two contradictory conclusions regarding the horizontal applicability of the Charter. In *Association de Médiation Sociale*,[70] the horizontal effect of Charter Article 27 was rejected by the Court in a judgment that failed to adequately clarify the criteria of Charter application between private parties.[71] As noted by Advocate-General Villalón, this interpretation was inconsistent with the purpose of the Charter to improve fundamental rights protection in the EU, since it narrowed the scope of the protection from the horizontality of the general principles of EU law into a purely vertical relationship.[72] In contrast, in *Google Spain SL and Google Inc.*, the Court imposed obligations on Google towards data subjects on the basis of Charter Articles 7 and 8.[73] However, the question of horizontal application was not explicitly discussed in that case.[74] The implications of this inconsistency are unclear, though the jurisprudence may suggest that the CJEU is ready to endorse a broad scope of application but is cautious due to the political sensitivity surrounding the continued extension of EU fundamental rights protection. While the CJEU has refrained thus far from providing any

[69] Rossi, "'Same Legal Value as the Treaties'? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights."
[70] CJEU, Association de médiation sociale v. Union locale des syndicats CGT and Others, C-176/12, 15 January 2014, ECLI:EU:C:2014:2.
[71] Murphy, "Using the EU Charter of Fundamental Rights against Private Parties after Association de Médiation Sociale."
[72] CJEU AG Opinion, Association de médiation sociale v. Union locale des syndicats CGT and Others, C-176/12, 15 January 2014, ECLI:EU:C:2014:2 § 35.
[73] CJEU, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, C-131/12, 13 May 2014, ECLI:EU:C:2014:317.
[74] Eleni, "The Horizontal Effect of the Charter of Fundamental Rights of the EU."

workable framework for Member State authorities and third parties potentially subject to Charter obligations, future case law may demonstrate a creeping horizontality.[75] Indeed, recent opinions by Advocate-General Bot have been attempting to orient the Court in this direction.[76] This may have transformative implications for the widespread use of the Charter in non-discrimination law, particularly in light of its extensive subject-matter scope.

Regardless of the CJEU's unwillingness of introduce a horizontal direct effect through judicial interpretation, the horizontal application of the Charter may come into play indirectly through the use of the Charter by national courts. According to the FRA, the Charter is used across the EU by domestic courts in a wide range of cases, including those that do not fall within the ambit of its scope under Article 51.[77] According to a survey conducted by FRA, the Charter is most often invoked in cases related to asylum and immigration, but anti-discrimination follows as the second most common area, with Article 21 of the Charter being one of the most often cited provisions.[78] This means that through its Charter-related case law, the CJEU can clarify the interpretation of the Charter provisions which then may be applied domestically. An advantage of this situation is that it allows a more decentralized approach, where national courts in Member States are free to determine to what extent they wish to rely on the Charter.

Finally, the scope of application of the Charter should be examined. As mentioned above, Article 51(1) limits the scope of application of the Charter to the acts of EU institutions and

[75] Murphy, "Using the EU Charter of Fundamental Rights against Private Parties after Association de Médiation Sociale."
[76] CJEU AG Opinion, Joined Cases Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn, C-569/16 and C-570/16, 28 May 2018, ECLI:EU:C:2018:337; CJEU AG Opinion, Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v. Tetsuji Shimizu, C-684/16, 29 May 2018, ECLI:EU:C:2018:338.
[77] European Union Agency for Fundamental Rights, *Fundamental Rights Report 2018* (Luxembourg: Publications Office of the European Union, 2018), http://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018.
[78] European Union Agency for Fundamental Rights.

Member States when acting as "*decentralized agents of the Union*" by implementing EU law.[79] This narrow scope clearly distinguishes the Charter from the other instruments introduced in this chapter. While the former part of the clause relating to EU institutions is straightforward, the interpretation of the latter has undergone a series of back-and-forths in the case law of the CJEU. The line of relevant case law precedes even the proclamation of the Charter, going back to the 1997 *Annibaldi* case.[80] In that case, the Court of Justice ruled that the concept of implementation extends beyond the transposition of EU law into domestic legislation, and includes national laws pursuing aims identical to EU law.[81] Conversely, in the 2012 *Yoshikazu Iida v Stadt Ulm* case, the Court returned to a more conservative interpretation, noting that the application of the Charter does not extend beyond the implementation of EU law and does not extend the competences of the EU.[82] That decision contradicted the proposal of AG Trstenjak, which surmised that according to the explanatory notes on the Charter and the jurisprudence of the CJEU thus far, the scope of application of the Charter should be extended to situations threatening the essence of EU citizenship by jeopardizing the fundamental freedoms it affords.[83] The subsequent *Akerberg Fransson* case of 2013 steered the Court's approach back to the broadening of the Charter's scope of application.[84] There, the Court considered that the Charter is to be applied to the interpretation of all national legislation falling under the scope of EU law.[85] More recent case law maintains this flip-flopping approach – in *Hernandez and Others*, the Court noted that "*the mere fact that a national measure comes within an area in*

[79] Jacqué, "The Charter of Fundamental Rights and the Court of Justice of the European Union: A First Assessment of the Interpretation of the Charter's Horizontal Provisions," 141.
[80] Rossi, "'Same Legal Value as the Treaties'? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights."
[81] Rossi.
[82] CJEU, Yoshikazu Iida v. Stadt Ulm, C-40/11, 8 November 2012, ECLI:EU:C:2012:691, § 78.
[83] CJEU AG Opinion, Yoshikazu Iida v. Stadt Ulm, C-40/11, 15 May 2012, ECLI:EU:C:2012:296.
[84] CJEU, Åklagaren v. Hans Åkerberg Fransson, C-617/10, 7 May 2013, ECLI:EU:C:2013:105.
[85] Rossi, "'Same Legal Value as the Treaties'? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights."

which the European Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable."[86] It is possible that the Court is attempting to unassumingly extend the scope of application of the Charter, avoiding political backlash by endorsing the broad interpretation of Article 51 when the national legislation in question complies with EU law and does not need to be struck down.[87] One possible reason for this could be the Court constructing a stable foundation in case law to support an eventual conflict.

As shown above, the various avenues for the broadening of the scope of application of the Charter generate inconsistent, sometimes paradoxical judgements from the CJEU. The future prospects of the Charter's application in non-discrimination cases is therefore particularly difficult to predict. Due to the fact that the deliberations of the Court are entirely secretive and the rules of the CJEU do not permit minority opinions, any analysis of the long-term strategy behind the Court's case law is bound to be speculative. While today the Charter is certainly not a major factor in Member State-level equal treatment policies, it has the potential to drive the CJEU's transformation into a more human rights-oriented institution with an equality mandate rivaling the ECtHR. This judicial extension of the EU's non-discrimination framework presents an alternative to the legislative model offered by the 2008 Commission proposal. The proposed Horizontal Directive remains in limbo despite being much less disruptive than a major extension of Charter applicability would be. This legislative inertia could mean that the transition to a more robust EU equality regime would have to rely on the judicial activism of the generally cautious CJEU.

[86] CJEU, Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others, C-198/13, 10 July 2014, ECLI:EU:C:2014:2055, § 36.
[87] Rossi, "'Same Legal Value as the Treaties'? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights."

2.4. The General Principles of EU Law and the Case Law of the CJEU

General principles of law fulfill an important function in the interpretive work of courts, both international and domestic. Suffice to recall the Statute of the International Court of Justice, which lists general principles of law among the sources of international law.[88] The general principles of EU law are no less important, being recognized in Article 6(3) TEU. As affirmed in Article 6(3) TEU, the general principles are derived from the common constitutional traditions of the Member States, although there is no clear criteria for how common and how specific a principle needs be in national legal orders to merit formal recognition by the CJEU.[89] On the one hand, general principles of EU law fulfill a pragmatic role as unwritten legal sources in the interpretation of EU law and national laws implementing EU law.[90] On the other hand, they fulfill a symbolic role in the constitutionalization of the European legal order.[91] Although the practical gap-filling function of general principles was most important in the early stages of the development of EU law when lacunae were more prominently present, the principles warrant an examination due to the far-reaching effect of the non-discrimination principle in the context of the horizontal application of EU law.[92] As in the case of the Charter outlined above, it should be considered whether the general principles may permit the CJEU to provide a superior judicial alternative to the 2008 Commission proposal.

The protection of fundamental rights as a general principle of EU law was established early in the jurisprudence of the Luxembourg Court. It was first referred to in *Stauder*, then later explicitly confirmed in *Internationale Handelshesselschaft mbH.*[93] The principle of non-

[88] United Nations, Statute of the International Court of Justice 18 April 1946, Art. 38.
[89] Takis Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press, 2007).
[90] Josephine Steiner and Lorna Woods, *EU Law* (Oxford: Oxford University Press, 2009).
[91] Tridimas, *The General Principles of EU Law*.
[92] Tridimas.
[93] Steiner and Woods, *EU Law*.

discrimination was confirmed as a general principle not long after, when it was recognized in the 1977 *Ruckdeschel* judgment.[94] The principle of equal treatment developed quickly, becoming one of the best developed among the general principles.[95] Nummhauser-Henning described the status of the equal treatment principle as undergoing a "*progressive constitutionalization*" since the adoption of the Amsterdam Treaty.[96] Indeed, the non-discrimination framework of the EU has been developed initially top-down, through the jurisprudence of the CJEU.[97]

In *Mangold*, the Luxembourg Court was called on to decide whether a provision of German labor law permitting age discrimination by lowering protections for employees was in compliance with EU law. Directive 2000/78 had not been transposed into German law at the time of the dispute, which required the CJEU to consider other elements of Community law. The case affirmed that non-discrimination is the expression of the general principle of equality, which is a fundamental norm of the EU legal order.[98] The judgment was criticized for giving direct horizontal effect to the general principle of non-discrimination.[99] General principles of EU law attaining direct horizontal effect would constitute a judicial extension of the scope of EU law significantly larger than what the Charter case law outlined above has been suggesting. *Mangold* has also created some uncertainties regarding the nature of general principles. The case suggested that the prohibition of age discrimination is a distinct principle, which would mean that the various status-based equalities – such as the prohibition of sex or race

[94] Christopher McCrudden and Sacha Prechal, "The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach" (European Network of Legal Experts in the Field of Gender Equality, November 2009), ec.europa.eu/social/BlobServlet?docId=4553.
[95] Constanze Semmelmann, "General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification," *Pittsburgh Papers on the European Union* 2, no. 1 (August 20, 2013), https://doi.org/10.5195/PPEU.2013.7.
[96] Numhauser-Henning, "The EU Ban on Age-Discrimination and Older Workers," 394.
[97] O'Cinneide, "The Uncertain Foundations of Contemporary Anti-Discrimination Law."
[98] O'Cinneide.
[99] O'Cinneide.

discrimination – exist as separate principles as well, not only as part of a more general equal treatment principle.[100] This question has not been addressed by case law since *Mangold.*[101] Horizontal applicability is not the only progressive element in the Court's interpretation of the non-discrimination principle. In *Dekker*, the Luxembourg Court showed that a comparator is not necessarily required for discrimination to be established.[102] As finding a suitable comparator is often a major hurdle in addressing multiple discrimination, if applied consistently, this jurisprudence could move the fight against multiple discrimination forward.[103]

In the context of explicit multiple discrimination however, the Luxembourg Court has been less courageous. It is useful to briefly examine three multiple discrimination cases from three different eras of EU fundamental rights protection to understand the general trend. The first multiple discrimination case that came before the CJEU was *Defrenne I*, which concerned the less favorable retirement conditions set for female flight attendants.[104] In that case, only the sex discrimination aspect was investigated from an equal pay perspective due to the absence of any age equality instruments at the time.[105] Approximately three decades later, the CJEU was called on to decide the *Lindorfer* case. By this point, the Equality Directives had been adopted, the Charter had been solemnly proclaimed, and *Mangold* has been decided. In *Lindorfer*, the protected characteristics of age, sex and nationality appeared simultaneously in the context of a pension scheme and actuarial calculations. After the Court of First Instance (now the General

[100] Steiner and Woods, *EU Law*.
[101] Steiner and Woods.
[102] Giacomo Di Federico, "Access to Healthcare in the European Union: Are EU Patients (Effectively) Protected Against Discriminatory Practices?," in *The Principle of Equality in EU Law*, ed. Lucia Serena Rossi and Federico Casolari (New York, NY: Springer Berlin Heidelberg, 2017), 229–53.
[103] Di Federico.
[104] CJEU, Defrenne v. Belgian State, C-80/70, 25 May 1971, ECLI:EU:C:1971:55.
[105] Jess Bullock and Annick Masselot, "Multiple Discrimination and Intersectional Disadvantages: Challenges and Opportunities in the European Union Legal Framework," *Colum. J. Eur. L.* 19 (2012): 57.

Court) dismissed the discrimination claim, an appeal was submitted, in which the general principle of non-discrimination was invoked in relation to all three grounds.[106] There was no attempt in the case from either Ms. Lindorfer or the Court to introduce a multiple discrimination or intersectional analysis. Instead, the analysis focused on each invoked ground independently, establishing eventually that there had been discrimination based on sex. The more recent 2016 *Parris* judgement came at a time when the Charter was already a binding instrument and multiple discrimination had already been on the agenda.[107] The approach of the CJEU regarding intersecting grounds remained unchanged in *Parris,* but at least it clarified the position of the Court. According to the judgement, "*where a national rule creates neither discrimination on the ground of sexual orientation nor discrimination on the ground of age, that rule cannot produce discrimination on the basis of the combination of those two factors.*"[108] Aside from the explicit rejection of intersectional analysis, *Parris* was important because – unlike in *Defrenne* or *Lindorfer* – the single-ground approach was insufficient for establishing discrimination. It is worth noting however that this decision departed from the opinion of Advocate General Kokott, who even used the terminology of multiple discrimination for the first time in the history of the Luxembourg Court.[109]

The trend shown by the three cases above clearly established the unwillingness of the CJEU to address multiple discrimination. More recent cases of multiple discrimination decided by the Court show that this trend may indeed remain unchanged. On 14 March, 2017, the Court decided two similar cases related to discrimination suffered by Muslim women for wearing a

[106] CJEU, Maria-Luise Lindorfer v Council of the European Union, C-227/04, 11 September 2007, ECLI:EU:C:2007:490.
[107] CJEU, Parris v. Trinity College Dublin, C-443/15 24 November 2016, ECLI:EU:C:2016:897.
[108] CJEU, Parris v. Trinity College Dublin, C-443/15 24 November 2016, ECLI:EU:C:2016:897, § 81.
[109] CJEU, AG Opinion, Parris v. Trinity College Dublin, C-443/15, 30 June 2016, ECLI:EU:C:2016:897.

veil: *Achbita* and *Bougnaoui*.[110] In both cases the women lost their employment due to their refusal to abide by workplace policies prohibiting the wearing of the veil. Such a situation offers a clear multiple discrimination element for analysis, as Muslim men and non-Muslim women are both unaffected by the contentious policy. The situation also leads to tangible negative consequences, namely unemployment. Despite the social relevance of alleged discrimination against Muslim women during a time characterized by the proliferation of veil bans around Europe, the Court entirely disregarded the intersectional aspect of the cases. The failure to engage with the issue even at a superficial level showed that the direction set previously by the Luxembourg Court would be firmly followed.

Since the elevation of the Charter to the level of the Treaties, the relevance of general principles of EU has not waned despite the fact that the general principles of fundamental rights protection are now expressed in a codified Bill of Rights.[111] In fact, recent decisions suggest that the Court is willing to afford general principles a high status. For instance, in *Kadi*, the principle of fundamental rights protection was used by the CJEU to trump a Treaty obligation to uphold UN sanctions.[112] As much of the development in EU equality law has been achieved through judicial means, the possibility is raised that general principles could provide an alternative to codified primary and secondary law instruments. From the fact that the horizontal application of general principles of EU law is limited to cases of discrimination, it could be surmised that equal treatment, a foundational principle of the EU, holds a special significance for the Court. At the same time, just as the Court has been cautious to expand the Charter's scope of application, a transformative turn in the jurisprudence of general principles is unlikely to be

[110] CJEU, Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, C-157/15, 14 March 2017, ECLI:EU:C:2017:203; CJEU, Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA, C-188/15, 14 March 2017, ECLI:EU:C:2017:204.
[111] Armin Cuyvers, "General Principles of EU Law," in *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, ed. Emmanuel Ugirashebuja, John Ruhangisa, and Tom Ottervanger (Leiden: Brill, 2017), 217–28, https://openaccess.leidenuniv.nl/handle/1887/58824.
[112] Cuyvers.

introduced. In combination with the rejection of multiple discrimination analysis by the Court, this prong of EU equality law is not a viable alternative to legislative reform.

2.5. The Horizontal Directive: Can it Bridge the Gaps?

Having examined the currently existing equal treatment mechanisms of the European Union, it is appropriate to scrutinize the provisions of the proposed Horizontal Directive. For this purpose, it is important to examine how the proposal extends the scope of protection, whether it introduces any change as to the interpretation of discrimination, how it defines justifications for differential treatment, whether it addresses multiple discrimination, and whether it contributes to a policy-based approach to complement the litigation-based equality framework. These factors will reveal to what extent the proposal is capable of filling the existing gaps in EU non-discrimination law and whether its innovations would at all contribute to the substantial progress of national equality regimes.

According to Article 3 of the 2008 Commission proposal, the scope of the new Directive would extend the protection of the Employment Equality Directive grounds to the areas of social protection, social advantages, education and access to goods and services, including housing. Combined with the Employment Equality Directive, it would extend the scope to the same level as Directive 2000/43, and beyond the protections offered by EU law for victims of gender-based discrimination. However, in terms of access to goods and services, the protection is qualified by the fact that the Horizontal Directive would only apply if the transaction is provided in the capacity of a professional or commercial activity. Regarding the extension of scope, it is important to note that the proposal does so by complementing the existing Employment Equality Directive, rather than by replacing it. The Horizontal Directive would therefore increase the fragmentation of the Directive-based system. Provided the inability of the Commission and the supportive Member States to adopt the instrument in a decade, it is

unlikely that this fragmentation would then be reduced through further legislative reforms, if the Horizontal Directive was at last adopted.

With regards to the grounds covered, permissible differential treatment and the definitions of discrimination, the 2008 proposal largely mirrors the Employment Equality Directive. The proposal has been criticized for failing to introduce more recent concepts in equal treatment. For instance, the proposal reproduces the medical approach with regards to disability and fails to address discrimination by association and discrimination based on assumption.[113] The same year the proposal was submitted by the Commission, the CJEU acknowledged discrimination by association in *Coleman.*[114] This discrepancy demonstrates how the Court is capable of producing progressive change where the European legislative process fails: elements perhaps seen as too controversial or overreaching by the Commission – and which indeed may have been vetoed by the legislative bodies – are integrated into EU law by the Court.

The proposed Directive likewise fails to implement any reforms in terms of multiple discrimination. As in Directives 2000/78 and 2000/43, multiple discrimination is only addressed in the non-binding recitals of the proposal. Recital 13 of the proposal acknowledges the concept of multiple discrimination but only in relation to women. This issue has been highlighted as a weakness of the instrument by the European Parliament's LIBE Committee.[115] The limited acknowledgement of multiple discrimination creates a contradictory situation. While the special vulnerability of women is emphasized in the Equality Directives, the adoption of the Commission proposal would relegate sex discrimination to the bottom of the *de facto* hierarchy of inequalities due to the comparatively limited material scope of the

[113] Bell, "Advancing EU Anti-Discrimination Law."
[114] CJEU, S. Coleman v. Attridge Law and Steve Law, C-303/06, 17 July 2008, ECLI:EU:C:2008:415.
[115] Gay Moon, "Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation," Briefing Note (Brussels: Civil Liberties, Justice and Home Affairs Committee, European Parliament, February 2009), http://www.europarl.europa.eu/RegData/etudes/note/join/2009/410670/IPOL-LIBE_NT(2009)410670_EN.pdf.

Directives addressing sex discrimination. Unlike with discrimination by association, the CJEU has not filled the gap in EU law when it comes to multiple discrimination. As such, addressing multiple discrimination in the proposal would carry important implications for reforming the non-discrimination framework in a substantive equality-minded manner.

The Commission's explanation of this omission according to the memorandum joined to the text of the proposed Directive is simply that such questions fall beyond the scope of the Horizontal Directive. A more comprehensive explanation would have been preferable, especially considering the importance of tackling multiple discrimination according to the Commission report on the question.[116] The memorandum does not make it clear whether the Commission would consider the addition of such provisions unworkable within the current legal framework, or indeed an undesirable overreach of EU competences. Clarifying the motivation of the Commission would dissipate many of the uncertainties surrounding the future of EU equality law.

It is certainly true that in practical terms, the fragmentation of the equality framework may be exacerbated if only one of the Equality Directives were to include provisions on tackling multiple discrimination. Suffice to imagine an intersectional claim that falls under the scope of the Horizontal Directive combined with another Directive that does not address this form of discrimination. At the same time, it is unfortunate that the Commission did not consider it appropriate to approach the question from a more policy-oriented angle if the litigation-based approach to multiple discrimination was deemed unworkable or undesirable. For instance, the proposal could have easily included an additional provision establishing a general state obligation or an obligation for the national equality body to research and address multiple discrimination in the way most appropriate given the national context. As it stands, the proposal

[116] European Commission, *Tackling Multiple Discrimination*.

includes an explicit permission to adopt positive action measures but contains no state obligation to promote equality, for instance through mainstreaming policies.[117] Instead, the proposal maintains a reactive, complaint-based, formal equality-focused approach to non-discrimination.[118]

Finally, the quasi-legal or policy-based aspects of the proposed Directive should be examined. The 2008 proposal contains multiple provisions furthering a more public policy oriented approach to non-discrimination, in line with existing EU Equality Directives. These provisions include obligations to provide information to the persons covered by the protections (Article 10), perform social dialog with stakeholders, especially civil society actors with a legitimate interest in the area (Article 11) and establish national equality bodies (Article 12). Under the proposal, the mandate of the equality bodies should extend to the provision of assistance to victims of discrimination, conducting surveys on the topic of discrimination and publishing reports and making recommendations on any issue related to equal treatment. While this required extension of equality body mandates would significantly broaden obligations under EU law, the practical impact of the envisaged extension of the mandates would not be transformative in light of current European equality body mandates.[119] This discrepancy highlights a drawback of the legal approach to equal treatment at the EU level, namely that due to the slowness of the legislative process, the novelties of a proposal become obsolete, while the developments of the equal treatment field – such as an increased focus on multiple discrimination or mainstreaming – are not represented.

[117] Bell, "Advancing EU Anti-Discrimination Law."
[118] Waddington, "Future Prospects for EU Equality Law. Lessons to Be Learnt from the Proposed Equal Treatment Directive."
[119] "Equinet Members."

2.6. Chapter Conclusions

The complexity of the EU anti-discrimination framework lies not simply in the fragmentation of the Directives but also in the complementarity and overlap between other equality instruments. Today, despite decades of development, the EU system of equal treatment as a whole is still primarily reactive, formal equality-based. However, EU law does offer a number of paths for progressive developments beside the 2008 Commission proposal, both legislative and judicial. In light of the CJEU case law, the possible extension of Charter applicability poses the most transformative opportunity, especially in view of the Horizontal Directive's uncertain future. However, while the CJEU may support the gradual transformation of the EU into an institution of fundamental rights protection in general, there is no evidence to suggest a readiness to abandon the traditional single-ground formal equality approach to discrimination.

The proposed Horizontal Directive could be characterized as a limited step forward that highlights the pitfalls of EU anti-discrimination law. The amendments proposed by the European Parliament certainly push the Directive in a progressive direction, yet even the amended iteration of the proposal fails to address core issues in EU equality law. Viewing the Horizontal Directive in the context of other EU equality instruments explains the criticism the proposal has received from proponents of progressive anti-discrimination laws. While it could hardly be characterized as a step back, its adoption would not significantly assist the efforts against multiple discrimination. At the same time, the adoption of much-debated piece of legislation like the Horizontal Directive could result in a level of complacency and unwillingness to open a new front in anti-discrimination.

3. National Equality Laws and Practice

The Equality Directives introduced in the previous chapter ushered in substantial changes in the national anti-discrimination policies of the Member States. Most importantly, the Directives forced the Member States to adopt laws protecting the newly introduced grounds and to establish national equality bodies. Prior to 2000, even states with well-established equality policies were largely focused on gender and race, while anti-discrimination institutions were dedicated almost exclusively to gender where such bodies even existed.[120] However, despite these reforms and the fact that EU law only prescribes a minimum standard, the challenges identified in the previous chapters persist at the national level as well. To understand the effectiveness of EU equality law and the consequences of possible reforms, the implementation of the laws should be analyzed at the level where discrimination is primarily tackled – the level of the Member States.

This chapter will apply a comparative analysis to the equal treatment frameworks used in Hungary, France and the United Kingdom. As will be demonstrated below, these three jurisdictions represent significantly different approaches to anti-discrimination, both in terms of legislation and judicial practice. These differences are reflected in their approach to multiple discrimination as well. According to the methodology presented in the introductory section, the analysis will examine the structure, aim and scope of the national legislations, as well as the case law produced by courts and national equality bodies.

[120] Andrea Krizsán, Hege Skjeie, and Judith Squires, "The Changing Nature of European Equality Regimes: Explaining Convergence and Variation," *Journal of International and Comparative Social Policy* 30, no. 1 (January 2, 2014): 53–68, https://doi.org/10.1080/21699763.2014.886612.

3.1. Member State Statutory Frameworks

For the analysis of the equality frameworks in the three jurisdictions, the structure, aims and scope of the national anti-discrimination laws must be explored and contrasted. First, it should be examined how the laws are structured, and whether they follow the fragmentation typical of EU law. The structure of the national legal framework is important for multiple reasons. On the one hand, fragmentation at the national level can result in the same measure of inability to tackle complex forms of discrimination as fragmentation at the EU level does. On the other hand, the structure of Member State laws also reveals how developments in EU anti-discrimination law have contributed to their adoption or transformation historically: whether the national laws were adopted in response to EU obligations, or if the existing laws had already fully conformed to EU obligations. Additionally, the examination of the structure and scope of the laws may reveal if indeed the developments in EU law had resulted in a negative transformation of the legal regime by increasing the fragmentation of an otherwise cohesive system.

3.1.1. Structure and Historical Context

In Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (*2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról - Ebktv*) is responsible for the implementation of the anti-discrimination principles enshrined in EU law and Article XV of the Basic Law of Hungary (Article 70/A of Hungary's pre-2011 Constitution, which included a nearly identical provision).[121] Prior to the 2003 Act, the Hungarian anti-discrimination framework was fragmented, constructed along various degrees

[121] Hungary, Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities.

of protection for ethnic minorities, women and disabled people.[122] As Hungary only acceded to the European Union during the 2004 round of enlargement, the country was in a unique situation compared to the UK or France. Since the *Ebktv* was adopted during the final stage of the accession, the Hungarian legislature had a motivation to display a high level of goodwill and ensure not only full compliance with the letter of EU law but also with its spirit. One way to do this could be the adoption of progressive laws demonstrating a commitment to fundamental rights protection. However, this was not the sole factor that propelled the Hungarian law to go far beyond the minimum requirements imposed by the EU. Indeed, civil society actors had long been lobbying for reform in order to improve the effectiveness of equal treatment protections and permit easier litigation.[123]

The drafting of the Hungarian Law on Equal Treatment was accompanied by a debate similar to the one surrounding the Commission's proposed Horizontal Directive. Of the two clashing views, one posited that a single, more general statute would provide a higher level of legal coherence, while proponents of a more fragmented system believed that it would permit the legislature to better tailor the anti-discrimination provisions to the specific needs of various vulnerable groups.[124] The former vision prevailed, which resulted in a comprehensive piece of legislation with a broad personal and material scope, covering all groups protected under Hungarian law and all aspects of public life. Purpose clauses, titles and preambles can provide ample evidence for the aim of the legislation, including whether the law is aimed at formal equality, equal opportunities or perhaps social justice.[125] In the case of the *Ebktv*, the Preamble

[122] Andrea Krizsán and Viola Zentai, "Institutionalizing Intersectionality in Central and Eastern Europe: Hungary, Poland, Romania and Slovenia," in *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes*, ed. Andrea Krizsán, Hege Skjeie, and Judith Squires (Basingstoke: Palgrave Macmillan, 2012).
[123] Krizsán and Zentai.
[124] Botond Bitskey and Tamás Gulyavári, "Hungary," in *The Law on Age Discrimination in the EU*, ed. Malcolm Sargeant (Kluwer Law International, 2008), 135–59.
[125] Karon Monaghan, *Equality Law* (Oxford: Oxford University Press, 2007).

states not only that the Act is aimed at providing effective legal remedy to victims of discrimination, but it also acknowledges a state obligation to create equal opportunities and ensure social convergence. Textually, this would suggest a more substantive equality-minded approach, one that recognizes the need for the state to intervene in social and economic relations on behalf of social justice.

The French approach to equality is uniquely universalistic and reluctant to acknowledge the unequal status of a group, as that would require the state to recognize differences between social groups.[126] As such, while the history of anti-discrimination laws in France goes back to the 1970s, even the more traditional protected grounds of race and religion were initially ignored in favor of sex equality.[127] As opposed to the Hungarian and UK equality frameworks primarily motivated by pressure to combat ethnic and racial inequality, the French system is traditionally driven by the ground of sex. Indeed, while France has traditionally been an exporter of sex equality in European law,[128] the French citizenship approach made the adoption of Directive 2000/43 particularly difficult due to taboo of race in France.[129]

The French system is highly fragmented, structurally different from both the Hungarian and the UK statutory provisions. At the same time, its fragmentation does not follow the structure of EU law either. Anti-discrimination legislation in France started in the labor sector and was expanded to other areas only in the last decade. Though regulations in labor first appeared in

[126] Cécile Frank and Philippe Hamman, *Quelle Mise En Oeuvre de La Directive Européenne Contre Les Discriminations Raciales? : Une Comparaison France, Espagne, Royaume-Uni* (Louvain-la-Neuve: De Boeck, 2014).
[127] Costanza Hermanin and Judith Squires, "Intersectionality in the 'Big Three': The Changing Equality Framework in France, Germany, Britain," in *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes*, ed. Andrea Krizsán, Hege Skjeie, and Judith Squires (Basingstoke: Palgrave Macmillan, 2012).
[128] Hermanin and Squires.
[129] Frank and Hamman, *Quelle Mise En Oeuvre de La Directive Européenne Contre Les Discriminations Raciales?*

relations to the protection of children by abolishing child labor,[130] the first explicitly anti-discriminatory provision was a 1972 law on equal pay between men and women.[131] Anti-discrimination initially was extended within the domain of labor and only in the context of sex inequality: 1983 laws nos. 83-635 and 82-689 prohibited discrimination in employment, dismissal and disciplinary action.[132] Today, the main anti-discrimination instrument in employment LC Article L 1134-1.[133] This provision replaced its predecessor, Article L 122-45, and simply refers to Act 2008-496 on anti-discrimination.[134]

The fragmentation and obscurity of the French system is worsened by the fact that with a few exceptions, the anti-discrimination laws are primarily amendments to existing provisions of the Labor Code or the Penal Code.[135] The result is that, unlike in the case of Hungary or the UK, individuals seeking information regarding their equal treatment rights will encounter difficulties in the absence of topical expertise. The limited accessibility of the law is a hurdle for victims of discrimination, particularly victims of multiple discrimination, who often come from disadvantaged backgrounds and lack the resources to independently research, understand and avail themselves of such a complex system. French equal treatment law remained largely stagnant until the 2000 Equality Directives, with no major reforms introduced in the meantime. This inaction shows that France needed the impetus of externally imposed legal obligations to begin a reform process. From the early 2000s, the goal of the legislature was securing the same

[130] Marie Mercat-Bruns and Aurélie Pallares Castany, "La faible visibilité juridique de la discrimination dans l'emploi fondée sur le jeune âge," *Agora débats/jeunesses* 74, no. 3 (2016): 63, https://doi.org/10.3917/agora.074.0063.
[131] "Lutte Contre Les Discriminations," accessed July 6, 2018, https://www.senat.fr/rap/r07-252/r07-2522.html.
[132] "Lutte Contre Les Discriminations."
[133] Sylvan Laulom, "France," in *The Law on Age Discrimination in the EU*, ed. Malcolm Sargeant (Kluwer Law International, 2008), 55–81.
[134] Philippe Martin, "La discrimination multiple, un concept insaisissable par le droit du travail ? Un point de vue français et comparatif," *Revue internationale de droit comparé* 63, no. 3 (2011): 585–608, https://doi.org/10.3406/ridc.2011.20017.
[135] "Lutte Contre Les Discriminations."

level of protection to all protected characteristics in order to assist the effective enforcement of the right to equal treatment.[136]

The reform process was initiated with the adoption of the anti-discrimination act of 2001.[137] This act introduced major changes by modifying and extending existing provisions, thereby transposing Directive 2000/78 and supplementing LC L 122-45.[138] Act 2001-1066 went beyond the minimum requirements of the Equality Directives. The law also added new grounds, such as physical appearance or surname, and significantly extended the range of prohibited discriminatory conducts. Previously, the Labor Code only prohibited discriminatory conduct in hiring, dismissal and sanctioning. This was extended to include any direct or indirect discrimination within the context of employment, such as less favorable treatment in remuneration or promotion. The permitted justifications for differential treatment mirrored those enshrined in Directive 2000/78 – both general and age-specific justifications. The same year, equality regulations in the labor sector were further developed with the adoption of the 2001 Loi Génisson,[139] imposing stricter gender equality planning for companies.[140] In 2008, Act 2008-496 was introduced, ushering in further changes despite the absence of new EU obligations.[141] The list of prohibited grounds of discrimination was further extended, as was the material scope: social protection and benefits, healthcare, education and goods and services were now included.

[136] Laulom, "France," 2008.
[137] France, Loi N°2001-1066 Du 16 Novembre 2001 Relative à La Lutte Contre Les Discriminations.
[138] Laulom, "France," 2008.
[139] France, Loi N° 2001-397 Du 9 Mai 2001 Relative à l'égalité Professionnelle Entre Les Femmes et Les Hommes.
[140] Hermanin and Squires, "Intersectionality in the 'Big Three': The Changing Equality Framework in France, Germany, Britain."
[141] France, Loi N° 2008-496 Du 27 Mai 2008 Portant Diverses Dispositions d'adaptation Au Droit Communautaire Dans Le Domaine de La Lutte Contre Les Discriminations.

In contrast with Hungary's sudden transformative reform and France's slower, patchwork-style reforms, UK anti-discrimination can be divided into distinct generations, initially starting with strictly formal approach, prohibiting only direct discrimination.[142] The UK system may be described as differentialist in contrast with the French universalist system.[143] Indeed, rather than refraining from acknowledging racial, ethnic and religious differences between UK citizens, the UK's framework focuses on these differences in order to reduce inequality. The UK equality regime developed from the 1960s onwards, starting with the Race Relations Act of 1965, making it the oldest of the three jurisdictions.[144] Although it would soon be followed by gender-based equality instruments, this shows the historical priority of the state. Racial tension was the most significant factor, even more so than ethnicity in the Hungarian context, and in stark contrast with the sex inequality-focused French and EU systems.

The framework developed and fragmented gradually with the addition of new, ground-specific statutes. The addition of sex as a protected status started with the 1970 Equal Pay Act, followed by the 1975 Sex Discrimination Act.[145] The UK system showed an early move towards the substantive equality approach, as the 1975 Act already included indirect discrimination as a prohibited conduct.[146] 1976 saw the adoption of a new Race Relations Act of 1976 mimicking the Sex Discrimination Act, followed two decades later by the Disability Discrimination Act of 1995.[147] Although the number of protected grounds was low before 2000, the protections extended to many areas. For instance, the 1995 Disability Discrimination Act included employment, education, public transport and membership of public or private associations.

[142] Hepple, *Equality*.
[143] Frank and Hamman, *Quelle Mise En Oeuvre de La Directive Européenne Contre Les Discriminations Raciales?*
[144] Hepple, *Equality*.
[145] Hermanin and Squires, "Intersectionality in the 'Big Three': The Changing Equality Framework in France, Germany, Britain."
[146] Hepple, *Equality*.
[147] Hepple.

After the adoption of the Equality Directives by the EU, the UK continued the extension of its equality regime in the same ground-specific manner as previously, adopting the Employment Equality (Religion or Belief) Regulation of 2003, the Employment Equality (Sexual Orientation) Regulation of 2003 and the Employment Equality (Age) Regulation of 2006 to bring the UK framework into compliance with EU obligations. However, unlike the UK equality statutes adopted before the EU equality regime was expanded, these new regulations were limited in scope. As their name suggests, the 2003 and 2006 Regulations transposed the minimum standards of age, religion and sexual orientation-based equality in employment, without the additional protections offered to the grounds of race, sex and disability. Aside from their more limited scope, the Regulations transposing the Employment Equality Directive also followed the equality concept of the EU framework by omitting the mainstreaming obligations present in previous UK statutes.

The historical statutory development outlined above demonstrates contradictory trends. On the one hand, the development aimed at the expansion of protections by edging towards a more substantive equality-minded approach and the gradual inclusion of new protected statuses. On the other hand, the inclusion of new grounds mandated by EU law created much more limited statutory protections, replicating the *de facto* hierarchy of grounds found in EU law, and which the two other Member States have successfully avoided. A possible reason for this contradiction could be the absence of political will to provide these new grounds equal protection. For instance, in terms of age, the UK would certainly not be an outlier in this regard. Suffice to consider the additional justifications for differential treatment enshrined in Directive 2000/78, also reflected in the French legislation. In terms of religion, the UK is also in a special situation. The sensitivity of religious discrimination in the UK is reflected in Article 15 of the Employment Equality Directive, which enshrines an exception from the prohibition

of religious discrimination for schools in Northern Ireland. It is unsurprising that UK national law would be similarly cautious.

2010 marked the latest major step in the development of UK equality law, ushering in its latest generation with the adoption of the Equality Act of 2010.[148] The adoption of the 2010 Act was analogous to the 2003 adoption of the *Ebktv* in Hungary, with the exception that in the UK, the newly horizontal structure replaced decades of ground-specific legal development, rather than roughly a decade worth of inconsistent statutes. The Equality Act of 2010 is a rather robust statute. The complete text of the Act is close to 100,000 words, an order of magnitude more than the Hungarian *Ebktv*, and significantly more than the EU equality instruments or various French equality provisions combined. The motivation for making the Act remarkably specific was to avoid a reliance on judicial interpretation.[149] While its specificity may clear doubts about its application, this level of complexity renders the Act highly inaccessible for non-experts of the topic.

The 2010 Act does not contain any purpose clauses that would set forward its interpretation of equality or the role of the state in pursuing social justice. Although UK legislation tends not to include purpose clauses, the debates preceding the adoption of the Act show that there was indeed support for an exceptional purpose clause.[150] The purpose clause advocated by the opposition was intended to convey a message similar to the purpose clause of the *Ebktv*. According to a House of Commons research report, the clause would have clarified that equality is an issue of principle for the UK, with the intention of shaping public attitudes and encouraging a progressive, activist approach for courts interpreting the many provisions of the

[148] United Kingdom, Equality Act 2010, c. 15.
[149] Krizsán, Skjeie, and Squires, "The Changing Nature of European Equality Regimes."
[150] Vincent Keter, "Equality Bill: Bill 85 of 2008-09," Research Paper (London: United Kingdom House of Commons, May 7, 2009), 85, http://researchbriefings.files.parliament.uk/documents/RP09-42/RP09-42.pdf.

Act.[151] Due to the robust nature of the Act and the unusualness of including a purpose clause in UK legislation, it is unsurprising that the clause was eventually omitted. At the same time, some conclusions can be drawn from the debate itself. The aim of the Act was not merely unifying the fragmented statutory framework and leveling up the scope of protections to an equal level for the different grounds. Rather, its purpose was creating a comprehensive equality regime that is still more flexible and open to new developments than its predecessor.

The effect of EU equality law and the case law of the CJEU is also apparent. Discrimination by association was included in the new Act specifically due to the then recent CJEU judgment in *Coleman*.[152] Additionally, Clause 191 of the 2010 Act was intended to make it easier to implement judgments of the CJEU that require the amendment of UK equality law.[153] Due to the focus on ensuring the smoothest transposition of EU developments into the UK equality framework, the current system opens up the door for the Luxembourg jurisprudence to affect equality law.

3.1.2. Scope

In terms of its scope, the *Ebktv* is remarkably broad and completely horizontal. The statuses protected by the Act are enumerated in a non-exhaustive list containing 19 specific grounds.[154] Aside from genetic features, the list explicitly mentions every ground listed in Article 21 CFREU. No distinction is made between the protected characteristics, and no special justifications are included for discrimination on the grounds of age, in contrast with EU law. The only exceptions from this general approach are religious and national minority educational institutions, which are permitted to operate in a segregated manner, provided that it is done

[151] Keter, 85.
[152] Keter, "Equality Bill: Bill 85 of 2008-09."
[153] Keter.
[154] Hungary, Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities, Art. 8.

with the express consent of the pupils or their guardians.[155] As a result of this general formulation of the Act, it fails to consider any specific needs of specific vulnerable groups. Nor does it address multiple discrimination in an explicit way, although the non-exhaustive nature of the list of grounds provides an opportunity for the recognition of intersectional statuses in court.

The material scope of *Ebktv* is likewise exceptionally broad. The Act is applicable to all vertical relationships between the individual and the state, and to all private relationships that enter the public sphere through the establishment of or intention to establish a legal relationship. This includes, for instance, employment, advertising an open position or advertising the provision or procurement of goods and services, including in housing or education.[156] As such, the material scope of the Act, does not only encompass every area covered by EU equality law, but it goes much further by extending this wide protection to all covered by its non-exhaustive list of prohibited grounds of discrimination. Although as noted previously, the Act does not attempt to address the specific needs of specific vulnerable groups, in theory the combination of the broad personal and material scopes allows the judicial authorities to address all forms of discrimination wherever they may manifest. In essence, this approach is closer to the equality concept of the ECHR than that of the EU.

Although the prohibited grounds for discrimination enshrined in French equality laws form an exhaustive list, the list and the formulation of the grounds is the broadest of the three jurisdictions examined, allowing courts to read new categories into them. Essentially, while the list is exhaustive, it is open-ended in practice.[157] Theoretically, French law does not require

[155] Hungary, Act CXXV of 2003, Art. 28.
[156] Bitskey and Gulyavári, "Hungary."
[157] Maria Vittoria Onufrio, "Intersectional Discrimination in the European Legal Systems: Toward a Common Solution?," *International Journal of Discrimination and the Law* 14, no. 2 (June 2014): 126–40, https://doi.org/10.1177/1358229113514675.

any reforms for courts to be able to address multiple discrimination claims.[158] French law currently recognizes a total of 25 grounds: age, sex, origin, real or perceived belonging to an ethnicity or nation or race, obesity, health, disability, genetic characteristics, sexual orientation, gender identity, political opinions, trade union membership, philosophical opinions, belief or lack therefore in a religion, family situation, physical appearance, ancestry, mores or habits, loss of autonomy, place of residence, particular vulnerability resulting from economic situation, ability to express oneself in a language other than French, and banking domiciliation.[159] French equality law is seemingly friendly to intersectional claims by virtue of not differentiating between grounds explicitly.[160] However, while not explicitly hierarchized, origin, lineage and racial or ethnic equality are elevated above others, as they cannot form basis of any justified direct discrimination. Combined with the broad nature of the protected characteristics, the result is similar to the Hungarian system. Even more so, as there is no mention of multiple discrimination anywhere in the equality provisions.

In the UK, the 2010 Act operates with an exhaustive list of eight protected grounds: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation. This makes the UK framework the narrowest of the three Member State jurisdictions examined. The Act provides barely more than the minimum required by the EU Directives in terms of scope, and significantly less than what the Charter offers. Indeed, the explicit inclusion of gender reassignment, marriage and civil partnership serves more to

[158] Sophie Latraverse, *Country Report: Non-Discrimination, France* (Luxembourg: Publications Office of the European Union, 2017), http://www.equalitylaw.eu/downloads/4414-france-country-report-non-discrimination-2017-pdf-2-12-mb.
[159] "Lutte contre les discriminations et promotion de l'égalité," Défenseur des droits, accessed March 23, 2018, https://defenseurdesdroits.fr/fr/institution/competences/lutte-contre-discriminations.
[160] Sylvan Laulom, "French Legal Approaches to Equality and Discrimination for Intersecting Grounds in Employment Relations," in *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, ed. Dagmar Schiek and Victoria Chege (London: Routledge, 2008), 278–94, https://www.taylorfrancis.com/books/e/9781134049325/chapters/10.4324%2F9780203892626-24.

emphasize the protection afforded based on sex and sexual orientation than it does to meaningfully expand the scope of the law. Suffice to recall the seminal *P. v S. and Cornwall County Council* case of the CJEU, which already in 1996 confirmed that sex equality should include the protection of transsexuals from discrimination under EU law.[161] In the context of multiple discrimination, the 2010 Equality Act therefore failed to introduce either possible solution found in French or Hungarian statutes: there is no open-ended list of grounds, nor vague, broadly defined grounds permitting courts to read new protections into the statute through interpretation. At the same time, one of the benefits of the new Act over the previous system was that is allows the eventual inclusion of new grounds into a horizontal system of protection by way of a simple amendment. Indeed, this was a feature of the Act that was deliberately pursued in order to ensure the future viability of the statute.[162]

Despite the limitations outlined above that might appear to render the 2010 Equality Act less progressive than its Hungarian and French counterparts, there is a unique feature of the Act, which differentiates it from all other instruments surveyed. Namely, it is the only statute that made an explicit attempt at addressing multiple discrimination. Initially not part of the Act, Section 14 on multiple discrimination was introduced as an amendment.[163] The provision was deemed necessary following a consultation with stakeholders that began in 2007.[164] Section 14 recognizes claims featuring two protected characteristics simultaneously. The provision is restricted to two grounds as this was deemed a fair compromise that would permit most intersectional claims to be made without complicating the law too much.[165] During the debate

[161] CJEU, P v. S and Cornwall County Council, C-13/94, 30 April 1996, ECLI:EU:C:1996:170.
[162] Keter, "Equality Bill: Bill 85 of 2008-09," 85.
[163] Hepple, *Equality*.
[164] Vincent Keter, "Equality Bill Committee Stage Report: Bill No 131 of 2008-09," Research Paper (London: United Kingdom House of Commons, November 13, 2009), researchbriefings.files.parliament.uk%2Fdocuments%2FRP09-83%2FRP09-83.pdf&usg=AOvVaw2e5y6ZYjsz6fknmXgFqNqN.
[165] Hepple, *Equality*.

on the provision, the opposition wished to open up the protection to any number of grounds, but the idea was rejected due to the lack of evidence of widespread multiple discrimination combining more than two characteristics.[166] In its current form, the provision allows the combination of any two protected characteristics, except marriage and civil partnership. A further limitation of the provision is that according to Subsection (4), multiple discrimination may only be claimed in cases of direct discrimination. Regretfully, despite these careful steps taken to avoid too radical a shift in equality law, the provision remains ineffective. To date, the provision remains a prospective element of the 2010 Act, meaning that it has not entered into force and may not be relied on in court.

3.1.3. Substantive Equality Provisions

Provisions promoting substantive equality are present in the *Ebktv* in Hungary. In line with the Basic Law of Hungary and the Preamble of *Ebktv*, the law prescribes special provisions aimed at reducing inequalities. This shows that the formalistic approach adopted by the EU Directives was deemed inadequate for the accomplishment of the equality goals of the legislature. Article 11 of the Act includes a saving clause for positive action in line with the relevant jurisprudence of the CJEU. The provision permits the adoption of positive action measures, as long as they are aimed at remedying a quantifiable, factual disadvantage suffered by a particular group, provided that the measures do not provide automatic advantage and do not preclude individual evaluations. While mainstreaming as such is not mandated by the Act, Chapter IV of the Act on Local Equal Opportunity Programs imposes an obligation on all local governments to adopt five-year equal opportunity plans.[167] These plans are intended to analyze the situation of vulnerable groups and formulate a complex plan to address the factors contributing to the

[166] Keter, "Equality Bill Committee Stage Report: Bill No 131 of 2008-09."
[167] Hungary, Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities, Art. 31.

inequalities identified. Although not as transformative as the mainstreaming of anti-discrimination may be, the provision requires local governments to focus on inequalities and develop measures with quantifiable goals.

In terms of substantive equality, UK equality law has made great leaps in the last two decades. By the turn of the millennium, notions of substantive equality had entered the UK framework. From 1997, gender mainstreaming was introduced in the UK via the creation of Women's Unit and Minister for Women.[168] Although not an element of the equality statutes, this development foreshadowed the progress of policies going beyond formal equality. By 2000, a positive duty called Public Sector Equality Duty (PSED) was introduced for public bodies to promote racial equality.[169] The 2010 Act did not regress in any of these areas. In Section 158, it permits positive action in line with EU standards, while PSED applies horizontally between all grounds with the exception of marriage and civil partnership.[170] According to the PSED prescribed by Section 149 of the Act, public bodies are obligated to maintain due regard to the elimination of discrimination and to advance equality. This wording is a subtle but progressive change from previous PSED obligations to simply promote equality.[171] The change requires authorities to take concrete steps in the pursuit of equality. As clarified by the *R (Brown) v Secretary of State for Work and Pensions* and *Bracking* cases, the aim of PSED is ensuring that equality becomes a central concern in policymaking,[172] more than just a question of "*ticking boxes.*"[173] Practical examples of the duty enumerated in the explanatory notes of the Equality Act include the

[168] Hermanin and Squires, "Intersectionality in the 'Big Three': The Changing Equality Framework in France, Germany, Britain."
[169] Hermanin and Squires.
[170] John Wadham et al., *Blackstone's Guide to the Equality Act 2010*, 3rd edition (Oxford: Oxford University Press, 2016).
[171] Hepple, *Equality*.
[172] Wadham et al., *Blackstone's Guide to the Equality Act 2010*.
[173] R (Brown) v. Secretary of State for Work and Pensions, England and Wales High Court 3158 (Administrative Court), Judgement of 18 December 2008.

revision of unwittingly discriminatory hiring practices or reviewing public services only available through the internet, which may therefore be less accessible for older persons.[174] Although, like the more formal equality-minded provisions of the Act, the PSED does not acknowledge multiple or intersectional discrimination, its mainstreaming of the equal treatment principle provides an opportunity to tackle complex forms of discrimination that does not exist in the Hungarian or French jurisdictions.

Unlike the Hungarian or the UK systems, French law does not emphasize the responsibility of the state in remedying inequality. The lack of acknowledgement of the state's role in eliminating inequality is reflected in the relatively limited substantive equality measures of the French system. In terms of basic positive action measures, the French laws are quite remarkable, although these extensive provisions are limited to sex equality. Hard gender quotas for private entities are well beyond the scope of the timid positive action policies of Hungary or the public sector equality duties of the UK, but the overwhelming focus on sex equality and employment for these policies makes them ineffective agents of transformative social change. The criticism that quotas help the most privileged layer of underprivileged groups certainly appears relevant in the context of gender quotas targeting corporate directorial boards. Victims of multiple discrimination are unlikely to see much benefit from such policies. At the same time, instruments of transformative social change are lacking compared to the two other Member States examined. The mainstreaming of equality policies is rather limited. Unlike in the Hungarian *Ebktv*, there is no requirement to develop equal treatment programs for local governments, nor is there an extensive equality duty comparable to the one imposed by the

[174] Explanatory Notes on Equality Act 2010, c. 15, https://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/11/1.

2010 UK Equality Act. The French equality body is mandated to assess the impact of policies on equality, but their status does not allow the imposition of sanctions.

3.1.4. Comparators

In terms of comparators, the *Ebktv* is rather brief. The use of a comparator is prescribed by the definition of discrimination used by the statute, namely that it involves the less favorable treatment along a protected characteristic compared to the treatment another individual does or would receive.[175] It follows from this wording that the law permits the use of hypothetical comparators, although the *Ebktv* does not provide any further clarifications or instructions. The only specific provision on comparators is found in Article 15(3), which describes a procedure whereby the Equal Treatment Authority may perform undercover tests using comparator individuals to collect evidence on discriminatory practices. However, as shown in the case law analysis of Chapter 3.2., the question of the comparator is generally underemphasized by courts and the national equality body alike.

The French legislation is analogous to the Hungarian *Ebktv* regarding comparators. The issue of comparators is not addressed specifically but is rather implicitly contained in the definition of discrimination. Law 2008-496 defines discrimination as less favorable treatment based on protected characteristics compared to how another is, was or would be treated. It is clear from this definition that the comparator does not fulfill a central role in the analysis and may indeed be entirely hypothetical. Indeed, in the French system, the comparators are generally not questioned by the courts, which instead focus on the objective justification of the contested treatment.[176] In the United Kingdom, the 2010 Act enacted a progressive step in terms of

[175] Hungary, Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities, Art. 8.
[176] Dagmar Schiek and Susanne Burri, eds., *Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?* (European Network of Legal Experts in the Field of Gender Equality, 2009), https://www.researchgate.net/publication/46718012/download.

comparators. While initially there were plans to remove the comparator requirement entirely from the law, the Act went only so far as to relax the requirement and allow the use of hypothetical comparators.[177] With this change, the United Kingdom joined the two other jurisdictions in eliminating the limitations a strict comparator requirement places on multiple discrimination claims.

3.1.5. Equality Body

The French system of equality bodies has undergone significant changes over the years, reducing its initial fragmentation. The High Authority against Discrimination and for Equality (*Haute autorité de lutte contre les discriminations et pour l'égalité - HALDE*) was created by Law 2004-1486.[178] The HALDE is the direct predecessor of the current French equality body, the Defender of Rights (*Défenseur des droits - DDD*), and had a mandate covering all prohibited forms of discrimination.[179] HALDE was entrusted with a number of responsibilities, the range of which was extended by Law 2006-396.[180] The DDD was created by Law 2011-333 in 2011.[181] The new equality body's anti-discrimination mandate was unchanged. The innovation of the Act was the merging of HALDE with three other institutions: the Mediator of the Republic (*Médiateur de la République*), the Children's Defender (*Défenseur des enfants*) and the National Commission of Security Deontology (*Commission Nationale de Déontologie de la Sécurité*).

The equal treatment mandate of the French equality body both to individual complaints and general measures. In individual complaints, the DDD is authorized to perform an investigation

[177] Keter, "Equality Bill: Bill 85 of 2008-09."
[178] France, Loi N°2004-1486 Du 30 Décembre 2004 Portant Création de La Haute Autorité de Lutte Contre Les Discriminations et Pour l'égalité.
[179] Laulom, "France," 2008.
[180] Hermanin and Squires, "Intersectionality in the 'Big Three': The Changing Equality Framework in France, Germany, Britain."
[181] France, Loi Organique N° 2011-333 Du 29 Mars 2011 Relative Au Défenseur Des Droits.

and hear the parties to the dispute. The body may attempt to mediate and facilitate an amicable resolution or turn to a judicial body and request legal sanctioning if it is deemed necessary. Additionally, the DDD may intervene in court cases by presenting an expert opinion on discrimination or provide legal assistance to victims. In terms of policy, the DDD fulfills an advisory role for the legislature, helps implement pro-equality programs, and researches and monitors discrimination. The mandate of the French body is therefore broader than that of the UK's Equality Commission but narrower than Hungary's quasi-judicial ETA.

Like its French equivalent, the Hungarian *Egyenlő Bánásmód Hatóság* (Equal Treatment Authority – ETA) was created as a response to EU obligations but with a mandate surpassing the minimum standards set by EU law. ETA was given a broad mandate by *Ebktv*. The body simultaneously fulfills monitoring, advisory and quasi-judicial roles.[182] In its quasi-judicial role, ETA receives individual complaints pertaining to any of the protected characteristics under Hungarian law. Once a complaint has been investigated, the body can either mediate between the parties to reach a settlement or impose financial sanctions on the respondent if unlawful discrimination is found. ETA is not a judicial body however, and it cannot request preliminary rulings from the CJEU.

ETA has acknowledged multiple discrimination by 2010, when an opinion of its advisory board confirmed that the other status category enshrined in the *Ebktv* should be used in cases of multiple discrimination.[183] Discrimination-related surveys by ETA have also been cognizant of multiple discrimination. For instance, a joint 2017 survey by ETA and the Hungarian Academy of Sciences found that over 20% of discrimination victims have suffered multiple

[182] Hungary, Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities, Arts. 14–18.
[183] Egyenlő Bánásmód Tanácsadó Testület, "288/2/2010. (IV.9.) TT. Sz. Állásfoglalás Az Egyéb Helyzet Meghatározásával Kapcsolatban" (Equal Treatment Authority, April 2010), http://egyenlobanasmod.hu/sites/default/files/content/torveny/TTaf_201004.pdf.

discrimination, the most vulnerable groups being Roma and disabled people.[184] At the same time, the equality body has not published any work dealing specifically with multiple discrimination. Evidently, multiple discrimination remains a marginal issue for ETA.

As for the UK, the fragmentation of equality bodies mirrored that of the early equality statutes. Prior to 2006, separate Equality Commissions existed for the grounds of race, sex and disability.[185] As such, the equality body system of the UK was considerably more limited than that of the two other jurisdictions, which enabled their national equality body to cover all protected characteristics. The Equality Act of 2006 created the Equality and Human Rights Commission (EHRC), which unified the previously compartmentalized framework, and which continues to be the single equality body of the UK today. The general mandate of the EHRC is closer to the French DDD in that it is not only responsible for anti-discrimination, but also the enforcement of the Human Rights Act, which implements the ECHR in UK law. In this capacity, the ECHR performs strategic litigation and interventions in cases before domestic courts and the ECtHR alike. In terms of individual complaints however, the mandate of the EHRC is even more limited than that of the DDD, as it may not independently investigate complaints. Instead, the EHRC performs broader inquiries covering public institutions, sectors of the economy or access to products and services.[186]

3.1.6. Conclusions on Statutory Frameworks

It is clear from the analysis that the concept of substantive equality appears to a different extent among the three jurisdictions. None of the equality framework examined are fully dedicated to formal equality, at least positive action being explicitly permitted in all of them. The statutes

[184] Mária Neményi, Bence Ságvári, and Katalin Tardos, *Legal Awareness of the Right to Equal Treatment* (Budapest: Equal Treatment Authority, 2017), http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH_2017_kutatas_ENG.pdf.
[185] Wadham et al., *Blackstone's Guide to the Equality Act 2010*.
[186] "Inquiries and Investigations," Equality and Human Rights Commission, accessed September 6, 2018, https://www.equalityhumanrights.com/en/our-legal-action/inquiries-and-investigations.

likewise demonstrate a trend towards more transformative equality approaches. Equality mainstreaming or the mainstreaming of ground-specific equality is more prominent in the context of public authorities and publicly owned companies. Whether the requirement is more narrowly tailored and requires only an equality strategy, or broader such as the PSED, such policies demonstrate a recognition of the inadequacy of the formal approach to equality. The introduction and consistent use of equality mainstreaming policies in the public sector are desirable, as they can lay the groundwork for eventual private sector policies, or at least develop a set of best practices that may be voluntarily adopted. Regardless of the ability of the judiciary to address multiple discrimination on an individualized basis, this trend towards social justice-minded policies will benefit victims of multiple discrimination.

At the same time, despite all examined jurisdiction inching towards the concept of substantive equality, multiple discrimination is effectively ignored by all the relevant statutes. The UK Equality Act of 2010 is the only legislation explicitly recognizing the importance of the issue, but the provisional nature of Section 14 on dual discrimination lends it a diminished effect. Explanatory notes or other background materials related to equality laws in the other jurisdictions do not reveal a similar interest in addressing multiple discrimination. It seems unlikely then that in the absence of EU obligations driving such change, the concept will gain recognition in Hungarian or French law.

While opening up the list of protected grounds appears to be an effective way to tackle multiple discrimination at the statutory level, surprisingly, the framework with the narrowest scope – the UK – comes closest to addressing complex forms of discrimination. Possibly, legislators are more willing to enact broad equality policies addressing complex discrimination or requiring mainstreaming if the list of protected grounds is narrower and the room for judicial interpretation limited. Since a common concern regarding anti-discrimination, particularly in

the context of the private sector, is that it can place an undue administrative and legal burden on employers and service providers, a statute limited to the protection of a handful of characteristics may reasonably embolden legislators to venture into the realm of substantive equality. The positive effect of such a framework could still be substantial. For instance, a combination of two grounds protected by the UK Equality Act of 2010 could cover most victims of multiple discrimination.

The effects of EU law, particularly the 2000 Equality Directives, are apparent in all the examined jurisdictions. This is true regardless of the level of protection offered prior to the adoption of the Equality Directives. Traditionally, the UK framework has been the only one to reflect the structure of EU equality law at the national level, but it no longer does since the 2010 Act. In terms of the Commission's 2008 proposal for a Horizontal Directive, the extension of material scope would not affect any of the three jurisdictions, as they already comply with the proposed requirements. Barring the inclusion of provisions on multiple discrimination or additional mandates for national equality bodies, it is difficult to see the benefit the three jurisdictions would gain from the adoption of the 2008 proposal. The proposal would not remedy the hurdles to tackling multiple discrimination identified: it does not prescribe mainstreaming requirements, it does not acknowledge multiple discrimination outside the recitals and it does not drive Member States towards a more holistic, substantial equality-minded approach. However, the symbolic value of Europe-wide legal reforms should not be ignored either. The EU finally completing a decade-old reform plan in the area of anti-discrimination may place the question of equal treatment at the center of attention, motivating Member State lawmakers to reflect on their existing equality frameworks.

In terms of the competence of equality bodies to address multiple discrimination, there are no major discrepancies. None of the bodies are explicitly mandated to address multiple

discrimination either academically or through litigation. While material published by the Hungarian and French equality bodies shows an awareness of the issue, none of the examined organizations treat multiple discrimination as a priority, nor is it regularly discussed in the context of substantive equality and social justice.

3.2. National Court and Equality Body Case Laws

Discrimination cases with intersectional or cumulative elements are common in all three jurisdictions. As seen above, anti-discrimination laws do not cover multiple discrimination in either country, but still provide various tools for courts to tackle such cases. For this reason, it is illuminating to analyze the multiple discrimination case law of the three EU Member States to discover which approaches are best suited to addressing complex forms of discrimination. The below analysis introduces and compares the approaches of national judicial bodies and equality bodies to multiple discrimination on the basis of select illustrative cases. The cases chosen feature situations where the alleged discrimination is clearly connected to more than one protected characteristics. Due to the limitations of the scope of present study, the analysis does not aim to provide a comprehensive picture of legal practice in Hungary, France and the UK, but merely identifies relevant features of the case laws.

3.2.1. Hungary

As in Hungary discrimination cases can be adjudicated by both the national equality body and courts, it is useful to examine the case law of both fora. Contrasting the two is more so important, as even a superficial look at the jurisprudences reveals a major difference. Searching through the official database of court decisions and the case law database of the ETA reveals that the former contains no mention of multiple or intersectional discrimination, while the latter

occasionally addresses the phenomenon.[187] The ETA's case law database, updated in mid-2018, even allows the user to filter by multiple discrimination – albeit showing no results at this point. While the difference in the use of terminology itself does not preclude the court system from using the concept in practice, this difference between the two institutions already suggests that the ETA is more activist in its approach to Hungarian equal treatment law.

One case is particularly illustrative of the approaches to equality applied by the courts and the ETA, as it was addressed by both institutions. The case of the so-called *numbered streets* concerned the eviction of the mainly Roma population of a heavily segregated, ghettoized area of the city of Miskolc. The case attracted considerable attention, provoking observations among others from the Organization for Security and Co-operation in Europe and the European Commission against Racism and Intolerance.[188] The case revolved around the amendment of a local decree on social housing, ostensibly aimed at evacuating the so-called numbered street due to the uninhabitable quality of the social housing provided there. However, two elements of the case suggested a more insidious intent. First, the mayor of the city had made openly anti-Roma statements previously, vowing to remove the Roma population from the town.[189] Second, the amended decree required the evicted families to acquire property outside the city of Miskolc if they wished to be financially compensated for the loss of their home.[190] The intersectional element of the case is clear. The families affected by the decree were all in a financially

[187] "Bírósági Határozatok Gyűjteménye," Bíróság, https://birosag.hu/ugyfelkapcsolati-portal/birosagi-hatarozatok-gyujtemenye; "Jogesetek," Egyenlő Bánásmód Hatóság, accessed October 3, 2018, http://www.egyenlobanasmod.hu/hu/jogesetek.
[188] OSCE/ODIHR Contact Point for Roma and Sinti Issues, "The Housing Rights of Roma in Miskolc, Hungary Report on the ODIHR Field Assessment Visit to Hungary, 29 June – 1 July 2015," Report (Warsaw, Poland: Organization for Security and Co-operation in Europe, April 27, 2016), https://www.osce.org/odihr/262026?download=true; European Commission against Racism and Intolerance, "Final Report on Hungary Adopted by ECRI at Its 66th Meeting" (Council of Europe, March 18, 2015), https://rm.coe.int/09000016805c39a3.
[189] OSCE/ODIHR Contact Point for Roma and Sinti Issues, "The Housing Rights of Roma in Miskolc, Hungary Report on the ODIHR Field Assessment Visit to Hungary, 29 June – 1 July 2015."
[190] OSCE/ODIHR Contact Point for Roma and Sinti Issues.

precarious situation, and most were of Roma origin, a combination responsible for their segregation and reliance on social housing, which enabled the city's administration to target them through the amended decree.

Before the ETA investigated the case of the numbered streets, the Administrative Bench [*Közigazgatási tanács*] of the Curia, the Supreme Court of Hungary, delivered a judgment on the housing decree.[191] Despite the obvious racial element of the case, the Curia refrained from engaging with the question of racial or ethnic discrimination. Rather than examining the case from the standpoint of a protected ground deeply rooted in Hungarian and European equality law, namely race or ethnicity, the Curia identified the disadvantaged group as "*persons living in low-comfort housing.*"[192] Although ethnicity, social origin and financial status are all explicitly protected under the *Ebktv*, the Curia decided opted for the "other status" clause to invent a narrowly tailored classification that fits the situation at hand but ignores the broader social context. After finding that the incentive aimed at ridding Miskolc of the targeted residents was not a legitimate aim, the controversial provision was struck down.[193]

This choice of ground for the analysis is somewhat baffling in light of the gravity of the case and the obvious racial bias involved. As the decision itself is relatively brief and no separate opinions are published by the Curia, the exact reasoning cannot be explored. Whether the racial element was ignored because the Curia wished to distance itself from the sensitive aspect of a politically controversial decision or simply because they saw a characteristic also covering the few non-Roma residents of the area as most suitable cannot be ascertained. However, it is evident that the Curia used an exceptionally narrow and formalistic approach that focused fully on the direct discrimination apparent in the case, leaving potential indirect discrimination and

[191] Kúria, Köf.5003/2015/4, 5 June 2015.
[192] Kúria, Köf.5003/2015/4, 5 June 2015, § 16.
[193] Kúria, Köf.5003/2015/4, 5 June 2015, § 20–21.

the city administration's intent unexplored. As such, not only did the Curia fail to address multiple discrimination suffered by Roma people of a precarious financial status, the Curia actually ignored both components of the discriminatory situation. The decision of the Curia made no reference to EU law. The omission of references to secondary EU law are understandable due to the choice of ground by the Court. While Directive 2000/43 could have been invoked for racial discrimination in housing, the characteristic of low-comfort housing dwellers is not recognized by any of the Equality Directives. At the same time, the Court made no mention of general equal treatment provisions either, whether by invoking the CFREU or the ECHR along with the national constitution.

An examination of other court decisions through the case law database revealed a similar omission of multiple discrimination. The database of court decisions returned no results to queries containing intersectional or multiple discrimination. Whether sequential, compound or intersectional, the Hungarian courts seem not to address multiple discrimination at all. Nor is multiple discrimination addressed in any way in the extensive report published by the Curia on the anti-discrimination practices of Hungarian courts in the field of employment.[194]

In contrast with the Curia, the ETA applied a strikingly different approach in the numbered streets case.[195] Unlike the Curia, the ETA opted not to focus on a single ground, much less by describing a new one under the "other status" clause. The decision of the ETA lists three relevant protected characteristics: ethnicity, social origin and financial status. The reasoning is careful not to examine these characteristics as divorced from one another or the broader social context. According to the ETA reasoning, the case is not one of direct discrimination, but rather intentional indirect discrimination targeting Roma individuals living amid precarious economic

[194] Erika Molnár et al., "Az Egyenlő Bánásmód Követelményének Megsértésével Kapcsolatos Munkaügyi Bírósági Gyakorlat - Összefoglaló Vélemény" (Curia of Hungary, June 26, 2017), http://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_-_egyenlo_banasmod.pdf.
[195] Egyenlő Bánásmód Hatóság, EBH/67/2015, 15 July 2015.

circumstances. At the same time, while the reasoning made it apparent that the ETA considered the vulnerabilities in the case inextricable from one another, the terminology of multiple or intersectional discrimination was avoided.

As follows from the broader analysis of the situation by the ETA, the decision went further than the Curia judgment, which only found one controversial provision of the housing decree to be problematic. In the decision of the ETA, the effects of multiple discrimination – even in the absence of the terminology – were examined in depth. The failure of the municipality to develop an anti-segregation plan specifically for the so-called numbered streets area was found particularly problematic by the ETA, as it affected the rights of the families even outside housing, for instance by limiting their access to education or employment. The decision of the ETA reflected a more substantive equality-minded interpretation of anti-discrimination, showing the difference between the scope of a formal and a substantive approach.

It was not must later, in 2016, that a reasoning of the ETA explicitly recognized multiple discrimination.[196] Since then, only a handful of cases have done so. Krizsán and Zentai argued that while the ETA has addressed many cases with a clear intersection element, the legal framework compels the institution to file these cases under a specific protected ground.[197] The case law suggests that this situation remains unchanged to date, aside from the occasional outlier. Such outliers may be the products of specific experts at the body injecting the concept into cases they examine, rather than any institutional policy. These few cases certainly do not point towards a more general trend of recognizing multiple discrimination.

It is evident that the courts and the ETA apply a markedly different approach to inequality, which prevents the former from acknowledging the reality of multiple discrimination. The

[196] Egyenlő Bánásmód Hatóság, EBH/168/2016, August 2016.
[197] Krizsán and Zentai, "Institutionalizing Intersectionality in Central and Eastern Europe: Hungary, Poland, Romania and Slovenia."

court cases and the ETA decisions examined show that EU instruments of non-discrimination are rarely referenced in the reasoning, and their effect on the outcome of the cases is imperceptible. As there appears to be no willingness on the part of the judicial and quasi-judicial authorities to engage in a substantive equality-based analysis and acknowledge multiple discrimination, merely providing additional legislative tools (such as a Horizontal Directive that recognizes intersectionality) enabling them to do so would likely not alter their approach.

3.2.2. France

The civil equality dogma mentioned in the analysis of the statutory framework also means that traditionally the French court system is more prone to taking a formal equality approach.[198] In practice, tribunals and the equality body all focus on single-grounds, despite the legal framework not excluding the possibility of invoking multiple grounds of discrimination in one case.[199] It is illustrative that of 600 cases analyzed by Laulom, only 6 referred to more than one ground.[200] However, these cases do not appear to use the concept of multiple discrimination, and instead are simply cases of compound discrimination where two separate grounds were examined independently.[201] For instance, in Paris Court of Appeal case no. 2001/32582, the court used male and female comparators, since the claimant was a black woman claiming sex and race discrimination.[202] In contrast, in Paris Court of Appeal case no. 2001/32582, the court permitted the claimant, a black woman, to use white men and a white woman as comparators,

[198] Marie Mercat-Bruns, "Age and Disability Differential Treatment in France – Contrasting EU and National Court's Approaches to the Inner Limits of Anti-Discrimination Law," *International Journal of Discrimination and the Law* 15, no. 1–2 (March 2015): 62–79, https://doi.org/10.1177/1358229114558383.
[199] Sylvan Laulom, "France," in *Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?*, ed. Dagmar Schiek and Susanne Burri (European Network of Legal Experts in the Field of Gender Equality, 2009), 53–57, https://www.researchgate.net/publication/46718012/download.
[200] Laulom.
[201] Laulom.
[202] Laulom.

implicitly acknowledging that the assessment of the discriminatory situation required the simultaneous appreciation of multiple grounds.[203] The approach of the French courts to the identification of the relevant protected characteristics is therefore somewhat inconsistent. French courts occasionally neglect to specify the protected ground at all, focusing instead on identifying discriminatory practices.[204] This approach is more reminiscent of the ECtHR's analysis of discrimination than that of the CJEU or Hungarian and French national bodies.

Another, more recent case illustrative of the French equality jurisprudence is the widely publicized discrimination case of L'Oréal. That case, decided by the Court of Cassation in 2009, included clear multiple discrimination elements.[205] In that case, a company responsible for recruiting employees for the cosmetics giant L'Oréal published a call aimed at young women described as "*BBR*", a shorthand for *bleu, blanc, rouge* – the colors of the French national flag, signifying that the applicants sought are white, ethnically French women.[206] The reasoning of the Court was largely concerned with establishing the existence of discriminatory practices through testimonies. The judgement does not use the terminology of multiple discrimination, but the effect of the disputed practices on non-white women of a migrant origin was acknowledged by the Court. In its approach, the Court was most akin to the Hungarian ETA from the bodies examined, with the difference that a lower priority was afforded to clarifying and listing the specific protected grounds. Essentially, the case law of French courts suggests that the protected characteristic and the identification of the comparator is not important as long as differential treatment is established.[207]

[203] Onufrio, "Intersectional Discrimination in the European Legal Systems."
[204] Laulom, "France," 2009.
[205] Fériel Kachoukh, "Discriminations multiples Rendre visible l'invisible," *Plein droit* 103, no. 4 (2014): 7, https://doi.org/10.3917/pld.103.0007.
[206] Cour de Cassastion, Chambre criminelle, no. 07-85109, 23 June 2009.
[207] Laulom, "France," 2009.

DDD, and HALDE before it, has published material on multiple discrimination, but does not apply the concept in cases that come before it.[208] The case law database of the DDD reveals that while the terminology of multiple discrimination or intersectionality continues to be neglected, the body often examines cases with clear multiple discrimination elements.[209] Such cases are numerous in the database of the DDD. For instance, in a 2017 dispute over a dismissal, the equality body found discrimination based on sex, pregnancy and family situation.[210] In another 2017 case, discrimination against two female victims of sexual violence was established on the basis of their sex, immigrant origin and inability to speak French.[211] In a more recent 2018 case, discrimination was found in hiring practices on the basis of age, sex and family situation.[212] The reasoning of these cases follows the practice of the courts outlined above: as long as the less favorable treatment can be established, the DDD does not expend much effort on identifying the comparators or specifying how the protected characteristics invoked synergize, if at all.

In case no. 2017-188, the reasoning of the DDD focuses entirely on the factual situation and on whether the dismissal of the applicant could be justified by the employer according to available information.[213] The grounds of the established discrimination are not regularly recalled in the body of the reasoning, nor does the DDD attempt to find a real or hypothetical comparator. The protected characteristics are listed in the second to last paragraph, without clarifying whether discrimination occurred on the basis of sex, pregnancy and family situation separately, simultaneously or if the combination of these characteristics is intended to describe

[208] Laulom.
[209] "Décisions Du Défenseur Des Droits," Défenseur des droits, accessed October 3, 2018, https://juridique.defenseurdesdroits.fr/index.php?lvl=cmspage&pageid=12&id_rubrique=88&opac_view=16.
[210] Défenseur des droits, no. 2017-188, 12 October 2017.
[211] Défenseur des droits, no. 2017-221, 21 July 2017.
[212] Défenseur des droits, no. 2018-052, 29 May 2018.
[213] Défenseur des droits, no. 2017-188, 12 October 2017.

a unique, intersectional situation. Directive 2006/54 was referenced in the case but only insofar as quoting the definition of discrimination. No other instrument of EU law was referenced in the reasoning. Likewise, in case no. 2017-221, the ECHR and relevant EU Directives were referenced in the preamble of the decision, but the reasoning did not cite specific provisions or rely on either definition provided in these instruments or the spirit of these laws.[214]

In terms of the application of European law, the cases examined show that relevant Directives, the ECHR and the CFREU are occasionally referenced, but their role is limited to a source of definitions or general principles, which do not substantially impact the decisions. The case law database of the DDD shows that the Charter is not invoked in discrimination cases. While the database contains close to 1000 decisions with the keyword "discrimination" to date, the Charter is only referenced in two of those. In contrast, the Charter is referenced by the equality body in the context of other fundamental freedoms. As in the Hungarian example, there is no willingness from the authorities to use EU laws to support more activist approaches to national laws.

3.2.3. United Kingdom

As the UK the equality body does not perform individual investigations and judicial or quasi-judicial functions, discrimination case law in the UK is limited to tribunals. However, the EHRC does perform strategic litigation in select cases and the authority intervenes in court proceedings deemed relevant to its mandate. As such, in terms of the UK, it is useful to analyze court cases with multiple discrimination element and examine whether the EHRC has intervened in or litigated such cases.

[214] Défenseur des droits, no. 2017-221, 21 July 2017.

The 2004 case of *Bahl v. The Law Society* was the first UK court case where the question of multiple discrimination was analyzed.[215] Employment Tribunals had previously permitted claims of multiple discrimination to be submitted, as they were willing to examine the interaction of more than one ground of discrimination.[216] However, no such case had gone to a Court of Appeal. *Bahl* concerned the Vice President of the Law Society, a woman of Kenyan origin who was suspended following multiple allegations made against her regarding the bullying of lower ranking colleagues. After her suspension, Dr. Bahl resigned from her position and raised a complaint of discrimination on the basis of her sex and race. In the lower instances, the case was examined by the Employment Tribunal and the Employment Appeals Tribunal. Interestingly, while not using the terminology of intersectionality, the Employment Tribunal chose "*white man*" as the hypothetical comparator.[217] This suggests that the Tribunal did not wish to compartmentalize Dr. Bahl's identities, instead examining whether she had suffered discrimination as a black woman.

At the appeals stage, the Employment Appeals Tribunal found the absence of distinction drawn between race and sex discrimination to be an error of law.[218] Subsequently, the Court of Appeal of England and Wales noted that to ensure the appropriateness of analysis, the hypothetical comparator chosen for this case should be a Vice President who is a white male.[219] At the same time, the Court agreed with the Employment Appeals Tribunal in that sex discrimination and race discrimination should have been examined separately in order to properly assess whether the less favorable treatment identified was motivated by prejudice.[220] It should be noted that at the time of this decision, the UK anti-discrimination framework had not been unified yet and

[215] Onufrio, "Intersectional Discrimination in the European Legal Systems."
[216] Solanke, "Putting Race and Gender Together."
[217] England and Wales Court of Appeal, Bahl v. The Law Society & Anor, Civ 1070, 30 July 2004.
[218] Bahl v. The Law Society & Anor, § 72.
[219] Bahl v. The Law Society & Anor, § 103.
[220] Bahl v. The Law Society & Anor, § 137.

the concept of dual discrimination had not yet been introduced. At the same time, while the Court of Appeal found fault with the Employment Tribunal's failure to examine sex and race separately, the comparator suggested by the Court, along with its reasoning, did not exclude a holistic examination of the discriminatory situation.

O'Reilly v BBC was a case decided shortly after the entering into force of the 2010 Equality Act, which showed a new, more permissive approach towards the use of multiple discrimination as a legal concept.[221] That case concerned a TV presenter that alleged discrimination based on her age and sex. Unlike in *Bahl*, the question of the prohibition of "*combined discrimination*" was addressed explicitly.[222] According to the respondent, the fact that dual discrimination was already included in the 2010 Equality Act in a provision not in force meant that practices resulting in dual discrimination were not unlawful at that point.[223] This argument mirrors the concerns voiced regarding the push for national and EU-level equality instruments to include the concept multiple discrimination, as too restrictive a formulation of the concept could limit the capacity of courts to utilize it.

However, the court did not accept the reasoning of the respondent. According to the court's interpretation of multiple discrimination, the constituting characteristics must be examined independently as well. Accordingly, in the hypothetical case of a woman over the age of 40 who is precluded from applying to a position, "*[b]oth [grounds] are significant elements of the reason that she suffers the detriment.*"[224] The court held that to permit dual discrimination while single-ground discrimination is prohibited would run contrary to the spirit of the statute.[225] In fact, the court undertook a careful analysis into the multiple discrimination aspect of the case,

[221] Hepple, *Equality*.
[222] London Central Employment Tribunal, O'Reilly v. BBC and others, no. 22004223/2010, 10 January 2011.
[223] O'Reilly v. BBC and others, § 238.
[224] O'Reilly v. BBC and others, § 345.
[225] O'Reilly v. BBC and others, § 247.

assessing even whether the discrimination was cumulative ("*both gender and age*") or more synergistic ("*a combination of gender and age*").[226] The court noted that there was no doubt that "*older women have faced particular disadvantage within the broadcast media.*"[227] The use of such analysis to establish discrimination despite the statutory multiple discrimination provision's non-entry into force is remarkable.

As for the equality body, the database of EHRC on third party interventions and strategic litigations does not reveal cases with an obvious multiple discrimination element.[228] Nor is the terminology used in the database, despite it being part of the 2010 Equality Act. It is possible that the EHRC will increase its focus on multiple discrimination once Section 14 of the 2010 Act comes into force. However, the relative lack of focus on the EHRC on multiple discrimination in publications compared to the ETA or the DDD shows that it might simply not be on the agenda of the body as a priority.

3.2.4. Conclusions on Case Law

The general omission of multiple discrimination from laws outside the UK means it is difficult to draw conclusions regarding the effects of multiple discrimination provisions. There is no guarantee that if included in EU or national legislation, the concept of multiple discrimination would be invoked in all relevant cases. However, while only a single example, *O'Reilly v. BBC* showed that statutory acknowledgment of multiple discrimination alters the judicial approach, even in the absence of binding force. The conclusion could be drawn that it would be useful to recognize multiple discrimination in national statutes even without the imposition of new legal obligations, for instance by discussing its relevance in attached explanatory memoranda or

[226] O'Reilly v. BBC and others, § 292.
[227] O'Reilly v. BBC and others, § 292.
[228] "Legal Cases," Equality and Human Rights Commission, accessed October 3, 2018, https://www.equalityhumanrights.com/en/legal-casework/legal-cases.

preambles. This would preclude concerns of a narrow multiple discrimination interpretation limiting the development of equality law down the line, while also providing courts with a point of reference in law for such cases.

In terms of comparators, much attention is paid to them in UK courts and in Hungary, while they are largely ignored in France. Despite the fact that the rigid use of comparators is considered to be a hurdle to litigating intersectional discrimination claims, the case laws examined do not support the idea that comparator-based analysis must be eliminated for multiple discrimination to be adequately addressed. This could be explained by the fact that even the bodies maintaining the central role of comparators in their analysis tend introduce some flexibility, allowing the use of hypothetical and multiple comparators within a single claim. As long as the statutory framework mandates or enables the courts to use such flexibility, comparators remain a useful element of the analysis, rather than a roadblock to favorable decisions.

As for national equality bodies, it is evident that multiple discrimination is not a prime concern for any of them, despite the Hungarian and French bodies studying the phenomenon. At the same time, fears that equality bodies with too broad a mandate may be unable to tackle complex discrimination cases appear unfounded. While the mandate of the DDD is much broader than that of the equal treatment-focused ETA, both effectively analyze discriminatory situations that include multiple protected characteristics. The Hungarian ETA appears most open to using multiple discrimination terminology in its cases. However, the reason for this is not evident based on the cases or the Hungarian statute. Due to the limited number of cases where multiple discrimination is discussed, it may be a factor of the individual case handler.

Finally, regarding the use of EU law, it appears that EU legal obligations affect the legislative to a much greater extent than they do the judiciary. While the FRA has found that references

to the CFREU are increasingly common, this trend is not visible in the equality case law of the three selected jurisdictions.[229] References to Directives, the Charter or the ECHR were rare in all three jurisdictions. It is not evident if the recognition of multiple discrimination in the proposed Horizontal Directive would drive courts to borrow the concept in the absence of a legal obligation to do so.

Conclusions

The ability of a legal framework to address multiple discrimination is important not only for individuals seeking remedy. It also speaks volumes about the capacity of the judiciary and the legislative to interpret complex social injustices that cannot be understood through a mere formal comparison. It is no coincidence that the sole jurisdiction openly acknowledging multiple discrimination is the one with the most extensive mainstreaming provisions in its equality laws. In light of this connection between multiple discrimination and substantive equality, the lack of attention afforded to multiple discrimination at the EU and the national level is unfortunate. At the same time, the increasing willingness of the European Commission to tackle multiple discrimination carries in it the potential to be a driver of change, even in the face of the cumbersomeness of European lawmaking.

In its current iteration, the proposed Horizontal Directive would not remedy the limitations identified in national equal treatment provisions. While the Directive remains innovative in the context of EU law, the decade-long debate over its adoption has rendered it obsolete compared to more dynamically developing national laws. The 2008 proposal continues to encompass the formal equality approach common to EU law instruments. As such, the long-awaited adoption

[229] European Union Agency for Fundamental Rights, *Challenges and Opportunities for the Implementation of the Charter of Fundamental Rights* (Luxembourg: Publications Office of the European Union, 2018), http://fra.europa.eu/sites/default/files/fra_uploads/fra-opinion-04-2018_charter-implementation.pdf.

of the Horizontal Directive would not help propel the EU towards a more comprehensive, transformative equality approach. It is evident that the explicit inclusion of multiple discrimination in equal treatment law is not a prerequisite for addressing such cases. It is also clear that a fragmented equality framework can be capable of tackling multiple discrimination. While the compartmentalization of protected characteristics has prevented the CJEU from addressing multiple discrimination, fragmented national systems are not incapable of doing so. The adoption of the Horizontal Directive could therefore still improve efforts against multiple discrimination both at the national and EU level despite its somewhat obsolete approach.

The extension of the Charter's use by the CJEU could permit the Luxembourg Court to sidestep the inadequacies of EU anti-discrimination law, but there is little benefit to this approach at the Member State level. There is no propensity from national bodies to invent new protected grounds that illustrate the intersectionality of a victim's situation. Since the preferred method of addressing such cases is by invoking the multiple synergizing characteristics individually, encouraging national courts to cite Charter provisions is unlikely to change outcomes. Giving national courts an instrument that uses a non-exhaustive list of grounds is clearly not the silver bullet against multiple discrimination. The unwillingness of the examined national courts and equality bodies to reference EU law and the Charter in discrimination cases means that a progressive interpretation of the Charter would not alter these national case jurisprudences. At the same time, the increased use of EU instruments in other jurisdictions presents exciting opportunities for further research into the effects of EU law on multiple discrimination.

According to the analysis, the content of statutory provisions is not the deciding factor in whether a national body appropriates the concept or language of multiple discrimination and intersectionality. As long as the statutes do not actively impede intersectional analysis by limiting discrimination claims to a single ground or prohibiting the use of hypothetical

comparators, multiple discrimination cases can be properly analyzed by courts and quasi-judicial bodies. This is true regardless of other limiting factors, such as the use of exhaustive lists in equality provisions or the fragmentation and compartmentalization of equality protections. As a result, equality bodies with expertise in discrimination may be better suited to address multiple discrimination if their mandate allows them to freely examine the broader context of a discrimination claim, rather than focusing on a specific contested practice or provision. Acknowledging multiple discrimination in CJEU case law could imprint the notion on national courts too. Even if the CJEU merely acknowledges the concept while noting that the current rigid, single-ground EU framework does not permit its use, it might provide impetus for national courts of legislatures to address the issue.

While the scope of present study did not extend beyond legal approaches, it must be noted that – in line with the notions of mainstreaming and transformative social change – binding EU or national laws alone cannot resolve the issue of multiple discrimination. The use of soft law, the financing of relevant research and the sharing of existing best practices in public policies is indispensable. This is supported by the fact that bodies fulfilling both judicial and consultative, monitoring roles are more likely to address multiple discrimination in their consultative capacity, which allows them more freedom. The duality of national equality bodies addressing multiple discrimination in surveys and recommendations but ignoring it in individual cases possibly shows that they consider the field of public policy to be the more appropriate space for a holistic, substantive equality-minded approach to anti-discrimination. Such work could be assisted at a European level without the adoption of new Directives or judicial activism from the CJEU. For instance, the data collection work performed by the Fundamental Rights Agency of the EU, such as the EU-MIDIS surveys, can effectively contribute to the identification and elimination of multiple discrimination.

To achieve a more comprehensive understanding of the relationship between EU law and national equality regimes, further research should be aimed at the increasing use of the Charter of Fundamental Rights by national courts, as well as the developing multiple discrimination case law of other Member States. It remains to be seen if advocacy effort reinvigorated by the tenth anniversary of the Commission proposal for a Horizontal Directive will manage to break the deadlock around the instrument. What is certain however is that the European Union's approach to anti-discrimination is in need of reform if it aims to recapture its role as a driver for progress in equality policy across Europe.

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