

Daniela Izzi

Intersectional Discrimination under EU Directive 2023/970 and Beyond: Challenges and New Perspectives for European Equality Law

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1. *The Directive on strengthening the principle of equal pay between men and women and the first explicit prohibition of intersectional discrimination in EU law*

Directive (EU) 2023/970, which aims to strengthen “the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms” (the so-called Pay Transparency Directive), introduces new regulatory instruments designed to address more effectively an inequality already taken into account in the original EEC Treaty (Article 119, now Article 157 TFEU). Despite this long-standing and progressively refined legal framework, gender-based pay discrimination continues to play a decisive role in perpetuating a significant gender pay gap within the European Union, which ultimately reflects a range of structural distortions in women’s labour-market participation¹.

¹ For an analysis of the highly complex content of Directive 2023/970, see, among the earliest contributions, MOIZARD, *Les logiques de la directive (UE) no. 2023/970 visant à renforcer Diritti Lavori Mercati International*, 2025, 2

Among the significant innovations set out in this Directive, the prohibition of intersectional discrimination is by no means secondary in importance.

The recognition of intersectional discrimination as a distinct legal concept can be regarded as a milestone in EU law. It represents the culmination of a critical trajectory commonly traced back to the work of the U.S. legal scholar who, several decades ago, first coined the term “intersectionality” to highlight the interaction between systems of sexist and racist oppression and expose the blindness of anti-discrimination laws and policies to the specific forms of disadvantage experienced by individuals, such as black women, who simultaneously belong to multiple marginalized groups². The powerful metaphor of the road intersection, and of the multiple collisions that may concurrently affect those located at that point, has been employed to illustrate the limitations inherent in one-dimensional representations of inequalities³, and to open up a new analytical perspective – the intersectional lens – which has been adopted across several disciplines, primarily in the social and human sciences, worldwide⁴.

l'application du principe de l'égalité des rémunérations entre les sexes, in *DS*, 2023, p. 877 ff.; FUENTES RODRÍGUEZ, *La directive 2023/970, por la que se refuerza el principio de igualdad de retribución a través de medidas de transparencia en materia retributiva y de mecanismos para su cumplimiento*, in *TL*, 2023, p. 223 ff.; IZZI, *Alla ricerca dell'effettiva parità di retribuzione tra uomini e donne: la Direttiva Ue n. 2023/970 come punto di svolta?*, in *RGL*, 2024, I, p. 301 ff. More in general, on the topic of gender pay inequalities see BENEDÍ LAHUERTA, MILLER, CARLSON (Eds.), *Bridging the Gender Pay Gap through Transparency*, Edward Elgar, 2024; EUROFOUND, *Equal value, equal pay: Concepts, mechanisms and implementation towards gender pay equity*, Publications Office of the European Union, 2025.

² The reference is to the seminal article by CRENSHAW, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in *UCLF*, 1989, p. 139 ff., followed shortly thereafter by CRENSHAW, *Mapping the margins: Intersectionality, identity politics, and violence against women of color*, in *SLR*, 1991, p. 1241 ff. Intersectional thinking, however, is largely indebted to the rich intellectual elaboration developed within black and postcolonial feminisms. For further discussion on this point, see YUVAL-DAVIS, *The Politics of Belonging: Intersectional Contestations*, Sage, 2011, pp. 4–5; HILL COLLINS, BILGE, *Intersectionality*, Wiley, 2020, 2nd ed.; MERCAT-BRUNS, VUATTOUX, DUFFULER-VIALLE, RENUCCI, MEYRAT, et al., *L'intersectionnalité: quelle utilité pour le droit de la non-discrimination?*, in *RDH*, 2025, pp. 8–9.

³ See CRENSHAW, *Demarginalizing the Intersection*, cit., pp. 149–150.

⁴ For examples of the application of the intersectional method to various disciplines, mostly outside the legal field, see the contributions collected in the special issue entitled *Doing Intersectionality in Explored and Unexplored Places*, in *AG*, 2022, vol. 11 (<https://riviste.unige.it/index.php/aboutgender/issue/view/91>). For an application within the body of legislation and

Notwithstanding the remarkable journey undertaken by intersectionality, not only in geographical but also in thematic terms⁵, and the attention it has received in United States and Canadian case law, as well as in international law, it has paradoxically struggled to gain full acceptance within the field of anti-discrimination law in which it first emerged⁶. The paradox may nevertheless be explained by the difficulty of reconciling the focus on multidimensional inequalities demanded by the intersectional approach with anti-discrimination law, which has traditionally been structured around specific identity categories and operates according to a single-dimension logic that permeates every aspect of its application.

Moreover, the vertical architecture of anti-discrimination law gives rise to coordination problems among heterogeneous rules applicable to different protected grounds. These difficulties are particularly evident in the EU legal order, where the various equality directives have differing scopes and contain exceptions or impose obligations that apply only to specific grounds⁷. Awareness of such difficulties, however, should not diminish the significance of the explicit recognition of intersectionality provided for by Directive 2023/970, marking the point of arrival of a long-standing process.

At the European level, the overlap between multiple identity characteristics at risk of disadvantage and the need to consider their combined effects received its first regulatory response a quarter of a century ago with the introduction of prohibitions of discrimination on grounds other than gen-

public policies aimed at overcoming the gender gap in the Italian labour market, see CORAZZA, *Il lavoro delle donne? Una questione redistributiva*, Franco Angeli, 2025.

⁵ The plurality of interpretations that intersectionality has received makes it even more difficult to provide a unitary definition. Such a task is in any case inherently complex, given that – as observed by NASH, *Intersectionality and Its Discontents*, in *AQ*, 2017, pp. 117–118 – “nearly everything about intersectionality is disputed”. It is nonetheless well established that intersectionality exposes the composite and systemic nature of inequalities.

⁶ In this regard, see, *inter alia*, ATREY, *Intersectional Discrimination*, Oxford University Press, 2019, p. 31, and, earlier, SOLANKE, *Discrimination as Stigma: A Theory of Anti-Discrimination Law*, Hart, 2017, p. 159, both nevertheless offering explanations for the persistent resistance of anti-discrimination law to intersectionality.

⁷ See FREDMAN, *Intersectional Discrimination in EU Gender Equality and Non-discrimination Law*, European Commission, Publications Office of the European Union, 2016, p. 62 ff.; SCHIECK, WADDINGTON, BELL, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart, 2007, p. 172 ff.; and, for a more general discussion, see the literature cited below at n 13.

der⁸ in supranational law through Directive 2000/43, concerning race and ethnicity (the so-called Race Equality Directive), and Directive 2000/78, concerning religion or belief, disability, age or sexual orientation (the so-called Framework Equality Directive). In the preamble to these Directives⁹, attention was drawn to the gender dimension of the inequalities addressed, noting that “women are often the victims of multiple discrimination” and that the interaction between the different grounds protected by equality law must therefore be taken into account.

The course inaugurated with this expansion of European anti-discrimination law continued into the new century. An important attempt to define the concept of “multiple discrimination” was made in a proposal for a so-called Horizontal Directive, presented in 2008 to extend the protection guaranteed by the Framework Equality Directive beyond the sphere of employment (and more precisely in social protection, education and access to goods and services)¹⁰. However, this proposed directive, which was amended in 2017 (with interesting changes involving the point under consideration here)¹¹, faced a complicated legislative process and was formally withdrawn in early 2025¹². The opportunity was thus lost to address the persistent misalignment in the scope of application of the European equality directives and the resulting difficulties in bringing judicial claims based on discrimination involving two or more protected personal characteristics falling within heterogeneous areas¹³.

⁸ Until then, gender had been the only ground of discrimination addressed by European Community law, apart from the prohibition of discrimination on grounds of nationality, which – as is well known – underpins the rules on the free movement of workers in the single market.

⁹ See in particular Recital 14 of the Race Equality Directive and Recital 3 of the Framework Equality Directive.

¹⁰ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: COM (2008) 426 final, 2.7.2008.

¹¹ In this regard, see XENIDIS, *Multiple discrimination in EU anti-discrimination law: towards redressing complex inequality?*, in BELAVUSAU, HENRAD (Eds.), *EU Anti-Discrimination Law Beyond Gender*, Hart, 2018, pp. 51–54; BELLO, *Intersezionalità. Teorie e pratiche tra diritto e società*, Franco Angeli, 2020, p. 316 ff.

¹² Annex IV to the EU Commission’s Communication on the Work Program for 2025, p. 25, states that this proposal is being withdrawn, explaining that it “is blocked and further progress is unlikely.”

¹³ On the uneven pattern of antidiscrimination protection and the complexities arising from the existence of separate and not fully consistent equality directives see FREDMAN, *Dis-*

Codifying the concept of “intersectional discrimination” in a normative source such as Directive 2023/970 on reinforcing pay equality between men and women, which concerns the most established subject matter of EU equality law and an area already covered by the existing body of that law, was arguably a more natural choice. After all, gender difference has from the outset been the primary catalyst for Europe’s political and scholarly engagement with the issue of multi-ground discrimination¹⁴. An important impetus for developing this approach also came from the EU Gender Equality Strategy 2020–2025, which emphasizes that “women are a heterogeneous group and may face intersectional discrimination based on several personal characteristics”. Moreover, the strategy presents “intersectionality – the combination of gender with other personal characteristics or identities, and how these intersections contribute to unique experiences of discrimination – as a cross-cutting principle” to be followed in its implementation¹⁵.

The terms “multiple discrimination” and “intersectional discrimination” are sometimes used interchangeably in the European Union, while in certain periods one has been preferred to the other¹⁶. The prevailing scholarly view in the old continent, however, is that the two terms refer to

crimination Law, Oxford University Press, 2012, pp. 143–145; BELL, *EU Anti-Discrimination Law: Navigating Sameness and Difference*, in CRAIG, DE BÚRCA (Eds.), *The Evolution of EU Law*, Oxford University Press, 2021, p. 675.

¹⁴ For insights and explanations in this connection see XENIDIS *Multiple discrimination*, cit., pp. 48–51. For an earlier discussion, see also GOTTARDI, *Dalle discriminazioni di genere alle discriminazioni doppie o sovrapposte: le transizioni*, in DLRI, 2003, p. 456. For a critique of the dilution of intersectional debate following its arrival in Europe, through processes of depoliticization and “whitening”, see – most recently and in line with a substantial body of scholarship – SOLANKE, *Intersectional discrimination as an epistemic injustice*, in O’CINNEIDE, RINGELHEIM, SOLANKE (Eds.), *Research Handbook on European Anti-Discrimination Law*, Edward Elgar, 2025, p. 237 ff.

¹⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Union of Equality: Gender Equality Strategy 2020–2025*, COM (2020) 152 final, 5.3.2020; for quotations p. 16 and p. 2 respectively.

¹⁶ The gradual shift from the former (which emerged in the international context and has sometimes been regarded as the most “neutral” term) to the latter, noted by XENIDIS, *Multiple discrimination*, cit., pp. 55–56, now appears to be further confirmed by the development outlined above. Indeed, an examination of the preparatory works of the proposed Horizontal Directive and of the Pay Transparency Directive reveals no substantial differences between the concept of “multiple discrimination” employed in the former and that of “intersectional discrimination” adopted in the latter.

non-coincidental phenomena. Specifically, though there is no single settled terminology, “multiple discrimination” is widely used – in line with the approach adopted by international institutions – as the broad, overarching concept covering all forms of multidimensional discrimination. This includes, on the one hand, forms of discrimination in which two or more grounds either operate independently at different times – as in what is commonly referred to as “sequential (multiple) discrimination” – or operate simultaneously within the same instance, yet remain analytically separable – as in what is commonly referred to as “additive (multiple) discrimination”; and, on the other hand, “intersectional discrimination”, in which, conversely, such separation is impossible, since the different grounds interact synergistically, producing a qualitatively distinct outcome¹⁷.

The synergy among grounds that cannot be disentangled in their co-constitutive dynamics of inequality production, together with the qualitative – rather than merely quantitative – difference of the inequality produced, constitutes a core feature of intersectional discrimination. These elements have been clearly identified from the outset¹⁸ and have more recently been conveyed through eloquent metaphors¹⁹.

¹⁷ For the framing of intersectional discrimination as a *species* of the *genus* of multiple discrimination see BURRI, SCHIEK, *Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?*, European Commission, 2009, pp. 3-4; FREDMAN, *Intersectional Discrimination*, cit., p. 27; XENIDIS, *Multiple discrimination*, cit., pp. 46-47; MILITELLO, STRAZZARI, *I fattori di discriminazione*, in BARBERA, GUARISO (Eds.), *La tutela antidiscriminatoria*, Giappichelli, 2020, p. 157 ff. *Contra* MAKKONEN, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore*, Institute For Human Rights, Åbo Akademi University, 2002, pp. 10-12; and more recently ATREY, *Intersectional Discrimination*, p. 213, who instead argues that intersectional discrimination, when broadly understood, is capable of operating as a *genus* encompassing the various manifestations of multi-ground discrimination (she indeed concludes her study by affirming that “there are good reasons to see all multi-ground discrimination as basically intersectional” and therefore that “when multiple grounds are implicated in a claim, it may best be understood in terms of intersectionality and characterized as intersectional discrimination”).

¹⁸ See CRENSHAW, *Demarginalizing the Intersection*, cit., p. 149: “Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women’s experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as *Black women—not the sum of race and sex discrimination, but as Black women*” (emphasis added).

¹⁹ See SOLANKE, *Intersectional discrimination*, cit., p. 232: “Just as oxygen and hydrogen pro-

Of the three forms of multi-ground discrimination, this is the least immediately recognizable. In sequential discrimination, several instances of discrimination based on different grounds occur on separate occasions and can be addressed judicially without raising particular difficulties. An example is that of a woman who is first excluded from company bonus schemes reserved for employees engaged in activities not traditionally performed by women, and who is subsequently denied access to overtime work on grounds of nationality. The resulting loss of income may ultimately induce her to resign, given the inadequacy of the remuneration she receives. Additive discrimination arises where two or more single-ground forms of discrimination overlap on the same occasion, each of which – as in the previous situation – can be identified and proven independently, even though their combined effect results in a cumulative disadvantage for the victim. This may occur, for instance, in the case of a female worker who, in the job she has obtained, is penalised in terms of pay both on account of her gender and because she is a migrant worker. Intersectional discrimination, by contrast, arises when the protected grounds are so deeply intertwined that their indivisible combination must be recognized in order to identify discrimination, or at least to fully grasp its distinctive and complex nature. It was precisely the failure to recognize that combination that determined the outcome of the US legal case which prompted the pioneering development of intersectional theory²⁰.

The *DeGraffenreid* case concerned a collective redundancy scheme implemented by General Motors, with layoffs that did not affect women in general, nor people of color as a whole, but specifically black women. These women had been among the last to be hired by the company and thus had less seniority. Since neither white women nor black men were made redundant, the court found that there had been neither sex discrimination nor race discrimination and, ultimately, no discrimination at all. This outcome starkly highlighted the serious limitations of the traditional single-axis approach adopted in anti-discrimination law, which failed to protect precisely those individuals most disadvantaged in the different protected groups.

duce water, not ‘oxyhydrogen’, or tin and copper together make bronze, not ‘timper’, the synergy in intersectional discrimination produce a new subject – Black women”.

²⁰ The reference is to the well-known case *DeGraffenreid v General Motors Assembly Division, St Louis*, 558 F.2d 480, C.A. Mo., 8th Cir. (1977), which is central to the analysis of CRENSHAW, *Demarginalizing the Intersection*, cit.

The same approach, as is well known, also underpins EU equality law, often preventing it from capturing the specific harm experienced by certain minority groups situated at the crossroads of multiple axes of inequality. This limitation became evident in the first case of intersectional discrimination brought before the Court of Justice, namely the *Parris* case (see § 2 below), which involved the interplay between sexual orientation and age. Arguably, however, the most striking example of unacknowledged intersectional discrimination in the European Union concerns corporate neutrality policies prohibiting the wearing of religious or ideological symbols in the workplace. These rules disproportionately affect Muslim women, while leaving unaffected non-religious or non-Muslim women, as well as male adherents of Islam (see further § 4 below).

Clearly, it is intersectional discrimination in this strict sense that most urgently requires a regulatory response, as it remains invisible when assessed through the traditional single-axis lens. The intersectional legal framework, however, may also contribute to a more accurate understanding of additive discrimination insofar as a synergistic interaction exists among the protected grounds involved. Consider, for example, the case of wage penalisation affecting an immigrant woman who has succeeded to a position previously held by a native male worker, in circumstances where it is extremely difficult to disentangle the respective roles played by gender and by ethnic origin or migrant status in producing the outcome of lower pay. In such a case, even where the situation can be disaggregated into two instances of single-ground discrimination – each of which may be separately identified and established before a court – the use of a single-axis approach to interpreting the disadvantage inevitably obscures certain dimensions of the disadvantage and fails to account for the synergistic effects generated by the interaction of multiple axes of inequality.

The permeability of the boundaries between additive or compound discrimination and intersectional discrimination becomes most evident when the analysis shifts from theory to judicial practice, as illustrated for example by Canadian case law applying the intersectional approach²¹. Without

²¹ In *Baylis-Flannery (Ontario Human Rights Commission and Rachael Baylis-Flannery v Walter deWilde, 2003 HRTO 28)*, a case concerning employer harassment of a young Black woman, the Ontario Human Rights Tribunal explained its decision to adopt an intersectional approach to discrimination, stating that while the employee could succeed in her claim for discrimination “on either enumerated ground of race and sex, or on both grounds, one set

purporting to resolve the much-debated question of the extent to which additive discrimination and intersectional discrimination are distinct or overlapping, this contribution instead aims to emphasise the necessity of fully embracing an intersectional perspective in order to properly capture the nature of complex forms of discrimination as they are experienced through lived identities in their entirety²². The most critical challenge posed by intersectional discrimination, however, remains its legal invisibility.

This article examines whether, and to what extent, Directive 2023/970, through the definition of intersectional discrimination set out in Article 3.2(e), delivers the long-awaited legal adjustment, and analyses the terms under which this occurs (§ 2). The formalisation of a legal notion of intersectional discrimination, while undoubtedly significant, is not in itself sufficient to ensure the effective application of the prohibition. In light of the rather vague provisions of the Pay Transparency Directive referring to intersectional discrimination, this article then seeks to sketch the basic contours of a regulatory model that could be applied in such situations, without purporting to provide exhaustive answers to the many open questions that remain (§ 3). It concludes by explaining why the prohibition of intersectional discrimination introduced by the European legislator in the context of gender pay equality should influence the case law of the Court of Justice well beyond that specific area (§ 4).

2. *The definition of intersectional discrimination and its remediable ambiguities*

Directive (EU) 2023/970 starts by acknowledging that “gender-based pay discrimination... may involve an intersection of various axes of discrimination,” thereby affirming the need to consider, in this context, the combination of “sex, on the one hand, and racial or ethnic origin, religion or belief, disability, age, or sexual orientation, as protected under Council Directive 2000/43/EC or 2000/78/EC, on the other” (Recital 25, echoing

following the other, the law must acknowledge that she is not a woman who happens to be Black, or a Black person who happens to be female, but a Black woman”.

²² The added value of subsuming within the notion of intersectional discrimination situations in which protection might already be afforded on the basis of a single ground is emphasised by BELLO, *Discriminazioni e diritto alla prova della complessità delle esperienze nello spazio giuridico europeo*, in *DeS*, 2024, p. 42.

the explanatory memorandum to the Commission's proposal of 4 March 2021). On this basis, Article 3.2(e) of the Pay Transparency Directive establishes that the prohibition of gender-based pay discrimination includes "intersectional discrimination, which is discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or 2000/78/EC".

However, this concise definition does not fully clarify the nature of that combination. This contrasts with the earlier version proposed by the European Parliament²³ and with the definition adopted by the European Institute for Gender Equality (EIGE)²⁴, which explicitly state that different grounds or personal characteristics can "interact with each other at the same time in such a way as to be inseparable," giving rise to unique and specific forms of discrimination. This lack of clarification has been considered problematic, as it leaves room for legislators tasked with transposing the Pay Transparency Directive into national law and for the courts to interpret the combination "as one that is synergistic or additive," thereby legitimizing an additive approach which has been described as "antithetical to the synergy underpinning intersectionality"²⁵.

Concerns about the margin of ambiguity inherent in the new definition are not unfounded, as shown by the conceptual divergences found even in the various language versions of the Pay Transparency Directive. In the Italian version, in particular, intersectional discrimination is not defined by referring to the combination of sex and one or more other protected grounds that lies at the root of the discrimination, as is the case in the French

²³ European Parliament Report A9-0056/2022, 22.3.2022, on the proposal for a directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM (2021) 93 final, 4.3.2021.

²⁴ EUROPEAN INSTITUTE FOR GENDER EQUALITY, *Intersectionality*, European Union, <http://eige.europa.eu/rdc/thesaurus/terms>, accessed 3 June 2025.

²⁵ DUBE, *Taking Stock of the EU Pay Transparency Directive's Intersectional Approach*, in *EELR*, 2024, pp. 46-47. The observation is persuasive, notwithstanding what has been noted above (§ 1) concerning the fluidity of the boundary between additive discrimination and intersectional discrimination, as well as the synergy among protected grounds that may also be identified in situations judicially addressed as the sum of instances of single-ground discrimination. The additive approach referred to here is, in fact, the one that led to the fragmentation of the complex discrimination at issue in *DeGraffenreid*, with the consequent denial of its unlawfulness, as will be discussed shortly.

and Spanish versions²⁶, which reflect the English text. Rather, it is defined by referring to the “combination of discrimination based on sex and any other ground referred to in Directive 2000/43/EC or Directive 2000/78/EC” and thus to the co-presence of different single-axis discriminations.

Confusing a single multi-ground discrimination with multiple separate single-ground discriminations is an issue far from negligible, as the additive logic underlying the recognition of different single-axis discriminations is precisely what, by requiring each to be proven separately, led the judges in the *DeGraffenreid* case to deny the existence of any discrimination whatsoever.

The same approach was followed by the Court of Justice in the *Parris*²⁷ case, which arose from the refusal to grant a survivor’s pension to the same-sex partner of a worker who had entered into a civil union with him as soon as it became legally possible under Irish law, but after reaching the age of 60, whereas the occupational pension scheme provided for payment of a survivor’s pension only if the member married or entered into a civil partnership before that age. In that instance, Advocate General Kokott invited the Court to consider the disadvantage arising from the interplay between the worker’s sexual orientation and age as a single form of discrimination, albeit only as an alternative line of reasoning²⁸. However, the Court ulti-

²⁶ In Article 3.2(e) of these two language versions, intersectional discrimination is, respectively, “*une discrimination fondée simultanément sur le sexe et sur un ou plusieurs autres motifs de discrimination* prohibés au titre de la directive 2000/43/CE ou 2000/78/CE” and “*la discriminación por razón de sexo combinada con cualquier otro motivo o motivos de discriminación* contra los que protegen las Directivas 2000/43/CE o 2000/78/CE” (emphasis added).

²⁷ Case C-443/15, *David L. Parris v. Trinity College Dublin and Others*, 24 November 2016, which has been the subject of numerous criticisms: see, for example, ATREY, *Illuminating the CJEU’s blind spot of intersectional discrimination in Parris v Trinity College Dublin*, in *ILJ*, 2018, p. 278 ff.; SCHIECK, *On uses, mis-uses and non-uses of inter-sectionality before the Court of Justice (EU)*, in *IJDL*, 2018, p. 82 ff.

²⁸ Opinion of Advocate General Kokott, C-443/15 *David L. Parris v Trinity College Dublin and Others*, 30 June 2016, at point 153: “The combination of two or more different grounds for a difference of treatment is a feature which lends a new dimension to a case such as this and must be taken duly into account in its assessment under EU law. After all, it would be inconsistent with the meaning of the prohibition on discrimination enshrined in Article 1 in conjunction with Article 2 of Directive 2000/78 for a situation such as that at issue here to be split and assessed exclusively from the point of view of one or other of the grounds for a difference of treatment in isolation” (emphasis added).

The choice made by the Advocate General to rely on the recognition of intersectional discrimination only as a last resort, rather than advancing it as the sole basis – as the referring Irish court had done – has been convincingly criticised as logically inconsistent by XENIDIS,

mately rejected this view²⁹. Having found no discrimination on the ground of sexual orientation on the one hand, nor on the ground of age on the other, the Court of Justice concluded that no other form of discrimination could be established³⁰.

In this light, it is quite clear that interpreting the new notion of intersectional discrimination in such a way as to reach conclusions of this kind would amount to a betrayal of the underlying rationale for its introduction, which appears to be primarily to ensure the recognition of forms of discrimination that would otherwise remain undetected. This may be inferred from Recital 25 of the Preamble to the Pay Transparency Directive; however, the preparatory works of the never-adopted Horizontal Directive are also relevant in this respect, as it was within that legislative framework – as noted above – that the first steps were taken towards the objective ultimately achieved by Article 3(2)(e) of the Pay Transparency Directive³¹.

Any ambiguity in the wording of this definition may be resolved by invoking the principle of *effet utile*, which requires EU provisions to be interpreted and applied so as to ensure their full effectiveness³². With regard

Multiple discrimination, cit. This choice undoubtedly reflects a cautious litigation strategy, which cannot, however, be regarded as preferable as a general approach, contrary to the view expressed by LOUSADA AROCHENA, *Mujeres y discriminación interseccional. Un ensayo sobre las mujeres en los márgenes*, Dykinson, 2024, p. 137.

²⁹ More precisely, the Court stated that “while discrimination may indeed be based on several of the grounds set out in Article 1 of Directive 2000/78, there is, however, no new category of discrimination resulting from the combination of more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established” (Case C-443/15, *David L. Parris*, para 80, emphasis added).

³⁰ In defence of the Court of Justice’s decision not to engage with an intersectionality perspective, PRECHAL, *Challenges in EU non-discrimination law: past, present, future*, in KORNEZOV, PICOD, BROHÉE, STAPPER (Eds), *Justice in Transition: Towards a United and Sustainable European Union*, Bruylant, 2025, p. 300, has observed that “none of the (interested) parties was able to explain what taking on board intersectionality would imply in the case at hand.”

³¹ See Council of the European Union, *Progress report on Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, 10740/19, 26 June 2019, p. 8: “Discrimination on multiple grounds is understood as discrimination, in any of its forms, occurring on the basis of any combination of two or more of the following grounds, including where taken separately the situation would not give rise to discrimination against the person concerned: religion or belief, disability, age or sexual orientation. Discrimination on multiple grounds should be recognised in order to reflect the complex reality of discrimination cases, as well as to increase the protection of the victims thereof” (emphasis added).

³² On this point, see further TRIDIMAS, *The General Principles of EU Law*, Oxford University

to the intersectional discrimination prohibited by Directive 2023/970, this therefore militates in favour of recognising the unlawfulness, above all, of situations in which the failure to take a unitary account of the synergistic interaction between multiple protected grounds would leave the resulting disadvantage without visibility and without redress. Another Recital of the Directive, moreover, in referring to “discrimination on multiple grounds which can be difficult to disentangle”³³, implicitly signals the need to move beyond the limitations of applying an additive logic to complex forms of discrimination.

In the meantime, it should be noted that the interpretative ambiguity found in the Italian translation of the Pay Transparency Directive’s definition of intersectional discrimination has not been carried over into the three subsequent Directives that reaffirm this concept – namely, Directive 2024/1385 on combating violence against women and domestic violence, and Directives 2024/1500 and 2024/1499, which establish standards for equality bodies operating, respectively, in the field of gender equality and with regard to other protected grounds. In the Italian versions of these Directives, intersectional discrimination is consistently defined as discrimination arising from the combination of sex and one or more other protected personal characteristics, rather than as a combination of distinct instances of discrimination, each based on a separately considered ground³⁴. A syner-

Press, 2013, 3rd edition, p. 418 ff.; MÉNDEZ-PINEDO, *The Principle of Effectiveness of EU Law: A Difficult Concept in Legal Scholarship*, in *JT*, 2021, p. 5 ff.

³³ It is Recital 48 which, with regard to the bringing of collective claims, states that this is facilitative precisely “when workers are facing discrimination on multiple grounds which can be difficult to disentangle”.

³⁴ More specifically, the Italian versions define intersectional discrimination as “discriminazione fondata sul sesso in combinazione con altri motivi di discriminazione di cui all’articolo 21 della Carta” (“discrimination based on sex in combination with other grounds of discrimination under Article 21 of the Charter”) in Directive 2024/1385 (Recital 6 and Article 16.4), and as “discriminazione fondata sul sesso in combinazione con uno o più motivi di discriminazione protetti a norma della direttiva 79/7/CEE, 2000/43/CE, 2000/78/CE o 2004/113/CE” (“discrimination based on sex in combination with one or more grounds of discrimination protected under Directive 79/7/EEC, 2000/43/EC, 2000/78/EC or 2004/113/EC”) in Directive 2024/1500 (Recital 15 and Article 5, similarly to Recital 16 and Article 5 of Directive 2024/1499, with the exception that, in the latter legislative instrument, sex is not accorded separate consideration in relation to the other protected grounds). A noteworthy feature of the Directive on gender-based violence – despite its only marginal relevance to the field of employment – is that the notion of intersectional discrimination it articulates differs from all others by expressly referring to the grounds protected under Article 21 of the EU

gistic interpretation of the new legal definition thus appears to be gaining traction even in contexts where it had previously been more uncertain.

3. *In search of a legal framework to address intersectionality: the Directive's limited guidance and the challenges ahead*

The imperfect definition of intersectional discrimination provided in Article 3.2(e) of the Pay Transparency Directive does not detract from the advances made in conferring visibility and legal substance to a concept that had previously existed in EU antidiscrimination law only in very fuzzy terms, and had been handled by courts and equality bodies with limited awareness, if not entirely overlooked.

Although many Member States have begun to engage with the issue of multiple and intersectional discrimination, and references to it can be found in national legislation and case law, the legal implications of intersectionality are still rarely fully grasped and given due recognition³⁵. For its part, the Court of Justice has often been able to identify and skilfully address instances of overlapping discrimination, but has not done so consistently. In particular, in key cases such as *Parris* and those concerning the Islamic headscarf in the workplace (see below, § 4), which could not be adequately addressed through a purely additive

Charter of Fundamental Rights. As is well known – and as recalled by BELL, NUMHAUSER-HENNING, *Equal Treatment*, in JASPERS, PENNINGS, PETERS (Eds.), *European Labour Law*, Intersentia, 2024, p. 263 – this provision sets out a list of grounds that is not only broader than those found in the anti-discrimination Directives, but also open-ended. It is therefore often relied upon as the basis for claims advocating the overcoming of the closed list of protected grounds, which are widespread – albeit controversial – within the legal scholarship on intersectionality: see, for example, ATREY, *Intersectional Discrimination*, cit., p. 146 ff.; *contra*, SCHIEK, *Revisiting intersectionality for EU Anti-Discrimination Law in an economic crisis – a critical legal studies perspective*, in *SD*, 2016, p. 23 ff. In the case of Directive (EU) 2024/1385, however, the reference to Article 21 CFREU does not appear to be capable of being read in this sense, since the notion of intersectional discrimination is employed there solely to ensure due consideration for the most vulnerable potential victims of gender-based violence.

³⁵ See FREDMAN, *Intersectional Discrimination*, cit., p. 9; BÖÖK, BURRI, TIMMER, XENIDIS, *A comparative analysis of gender equality law in Europe*, European Commission, Publications Office of the European Union, 2024, pp. 18–19; BELLO, *Intersezionalità. Teorie e pratiche*, cit., p. 347 ff. As regards Italy, references to multi-ground and intersectional discrimination have begun to appear in labour case law in recent years, albeit still in rather generic and indistinct terms. See, for instance, Trib. Palermo, 17 November 2023, in *RGL*, 2024, II, p. 170 ff.; Trib. Busto Arsizio, 3 February 2025, in *ADL*, 2025, II, p. 707 ff.

approach, the Court has demonstrated a lack of sensitivity to the specific protection needs of individuals situated at the intersection of different protected grounds³⁶. There is thus a clear utility in opening up EU equality law to intersectionality in a way that is both structural and coherent, especially in view of the significant guiding role performed by this supranational legal order.

The terms in which the Pay Transparency Directive achieves this openness may be seen as a development of the earlier scholarly proposal to “incorporate intersectional insights through a capacious view of existing grounds,” by construing those grounds as “sufficiently capacious to address the confluence of power relationships which compounds disadvantage,” and by suggesting that “all aspects of an individual’s identity should be taken into account even within one identity ground”³⁷. The technique for addressing multi-grounds discrimination based on the “capacious view of existing grounds,” traces of which can be found in international human rights law³⁸, presupposes the identification of a “lead” ground within which to operate in order to shed light on other dimensions of the disadvantage suffered. This would not require dismantling the single axis approach underpinning the entire EU equality law apparatus, which would entail enormous theoretical and practical difficulties³⁹, but would instead entail

³⁶ For a thorough analysis of the case law in which the CJEU has, in substance, dealt with multi-dimensional discrimination – though without making any reference to multiple or intersectional discrimination – see XENIDIS, *Multiple discrimination*, cit., p. 59 ff., XENIDIS, *From critical theory to litigation strategy: Can intersectionality transform EU equality law?*, in *ELJ*, 2025, p. 22 ff., and, earlier, FREDMAN, *Intersectional Discrimination*, cit., p. 71 ff.

³⁷ See FREDMAN, *Intersectional Discrimination*, cit., pp. 86–87 for the quotation, and more extensively p. 66 ff., in the commendable attempt to prompt a response to intersectional discrimination irrespective of legislative reform.

³⁸ In particular, the references are to the application of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and of the Convention on the Rights of Persons with Disabilities (CRPD).

³⁹ An alternative approach to addressing intersectional discrimination has been proposed to avoid the excessive fragmentation that may result from creating too many subjective categories – and the consequent risk of diluting anti-discrimination law – without leveling down differing individual experiences into the predominant protected ground. This approach entails reorganizing the grounds of discrimination around three core nodes, viz., race, gender, and disability: see SCHIEK, *Organizing EU Equality Law Around the Nodes of “Race”, Gender and Disability*, in SCHIEK, LAWSON (Eds.), *European Union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination*, Routledge, 2016, p. 11 ff.

By contrast, see ATREY, *Intersectional Discrimination*, cit., for a radical rethinking of the entire framework designed for single-axis discrimination, and SOLANKE, *Discrimination as*

the introduction of the adjustments necessary to respond to the challenges posed by intersectionality.

The impression that the legislature has adhered to this framework may stem from the fact that, while recognizing intersectional discrimination as an autonomous legal notion, the Pay Transparency Directive links it specifically to gender-based pay discrimination, which it expressly prohibits. In doing so, it effectively anchors this new category of discrimination to the particular protected ground covered by the Directive. Accordingly, this Directive adopts a sex-centered definition of intersectional discrimination, which is addressed via the framework of sex discrimination. Here too, a “lead” ground therefore appears to be envisaged, even if this framing is intended to distance itself from any idea of competition between protected grounds, that is, from an approach that considers “a focus on one as eclipsing another”⁴⁰. This framing of intersectional discrimination, however, fails to take account of the fact that its sex-centred definition is the immediate consequence of the legal basis (Article 157.3 TFEU) and of the subject matter of Directive 2023/970, and thus does not necessarily point to a specific position on how to reconcile the consideration of multiple axes of inequality with the structure of anti-discrimination law. The subsequent reiteration of the prohibition of intersectional discrimination in Directive 2024/1499 on equality bodies, which does not focus on gender, further undermines the idea that intersectional discrimination is necessarily channelled towards a predetermined “lead” ground⁴¹.

However, if the aim was to lay the groundwork for a regulatory model of intersectional discrimination, it is hardly surprising that the legislature chose to begin with gender, the ground that has received the most long-standing and robust protection under EU equality law and that, as has

Stigma, cit., for the proposal of an alternative method to legally operationalise intersectionality based on the anti-stigma principle.

⁴⁰ Competition between different protected grounds – which, in this context, would result in grounds other than gender being treated as of secondary importance – is criticized by FREDMAN, *Intersectional Discrimination*, cit., p. 70 (also for the quotation above).

⁴¹ Indeed, Directive 2024/1499, which concerns equality bodies in relation to all grounds protected under EU anti-discrimination law, no longer adopts a sex-centred definition of intersectional discrimination, describing it (in Recital 16 and Article 5) as “discrimination based on a combination of grounds of discrimination protected under Directives 79/7/EEC, 2000/43/EC, 2000/78/EC or 2004/113/EC’.

already been noted, has dominated the debate on intersectionality in the European context.

The features of this model and the concrete implications of its normative adoption are outlined only in a very preliminary manner in the Pay Transparency Directive, raising more questions than it answers, starting with its preamble. Here (in Recital 25), the Directive emphasizes the need to enable national courts, equality bodies and other competent authorities to take due account of any disadvantage arising from the intersection of various axes of inequality both “for substantive and procedural purposes”. It therefore clarifies that this is particularly relevant in facilitating the recognition of an intersectional discrimination – including through the selection of an appropriate comparator and the proper application of the proportionality test – and in ensuring an adequate remedial response.

Among the various factors identified as requiring adjustment in light of the intersectional nature of discrimination, the approach to comparison is undoubtedly central; however, no guidance is provided in the Directive. The sensitivity of the comparative exercise is hardly surprising, given that, as is well known, comparison generally plays a decisive role in determining whether discrimination exists and, in certain specific situations, whether it is direct or indirect⁴².

The issue first concerns the scope of comparison, which must be defined broadly enough to apply it effectively⁴³. In the context of widespread horizontal gender segregation, for instance, extending the principle of equal pay from equal work to work of equal value constituted a crucial step in addressing gender pay discrimination, although it remains to a large extent underutilised⁴⁴. Given that the equivalence in the value of work is frequently obscured by gender-based bias and the systematic undervaluation of typically feminised skills, the Directive (Article 4) lays down a set of criteria designed to facilitate the objective assessment of such value. Considering

⁴² In the case law of the Court of Justice, see, in this regard, Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisija za zashchita ot diskriminatsia*, 16 July 2015.

⁴³ On the scope of comparison, the Pay Transparency Directive (Article 19.1) reiterates that it is not limited to those who work for the same employer but includes all wages from a single source establishing the pay conditions, in the sense now specified by Recital 29.

⁴⁴ For a recent illustration of its effective application by the Court of Justice, see Case C-624/19, *K and Others v Tesco Stores Ltd*, 3 June 2021. On the continuing difficulties in determining equal value, see EUROFOUND, *cit.*

the explicit opening towards an intersectional perspective, those same criteria should operate as a safeguard against the aggravation of remuneration penalties resulting from the cumulative interaction between gender and other protected grounds. In assessing work activities for the purposes of determining their potential equal value, due account should in any event be taken of additional personal dimensions which, in certain contexts, may reinforce the adverse effects of horizontal gender segregation, as exemplified by ethnic origin and/or nationality in sectors such as domestic work, personal care or cleaning services.

Selecting the comparator is even more delicate, however, as the exercise is sometimes far from straightforward and becomes particularly complex in cases of intersectional discrimination. Here, revealing the alleged disadvantage suffered by individuals situated at the intersection of multiple protected grounds (e.g., black women) requires forms of comparison that take that overlap into account, such as “diagonal” comparisons with persons embodying the opposite sets of characteristics, which may, however, in practice prove unfeasible or inadequate. Ignoring the intersection between different factors, moreover, makes it possible to focus attention on the privileged subjects within the female group (white women) and within the group of Black persons (Black men), thereby excluding, respectively, a finding of gender discrimination and of racial discrimination. A range of solutions concerning the comparative framework have been proposed in the scholarly literature and applied in legal systems that have addressed intersectional discrimination, including the approach of engaging with all relevant comparators in the specific claim (that is, the full breadth of comparator groups which do not share one, some, or all of the claimant’s personal characteristics)⁴⁵.

The complexity of the emerging scenario may prove discouraging. Given these difficulties, some reassurance may be found in the thoughtful analyses of the case law of the Court of Justice of the European Union, which show that, over time – and even without formally adopting an intersectional approach – the Court has addressed situations involving the coexistence of various axes of inequality, demonstrating, in substance, “some awareness of the existing synergies between the social systems that create

⁴⁵ For this latter proposal, see ATREY, *Comparison in Intersectional Discrimination*, in *LegS*, 2018, p. 379 ff., illustrating the approach through a case from the South African legal system, and arguing for its preference over the comparative methods employed by US and UK courts.

and sustain disadvantage”⁴⁶. Indeed, through a contextual and situated analysis attentive to the specific nature of the alleged disadvantage, the Court of Justice has repeatedly succeeded in identifying differences not only between groups defined by opposite characteristics (e.g., women and men), but also within groups sharing the same protected characteristic (e.g., women). It has done so by shaping comparison with the necessary flexibility to account for such distinctions: as seen, for instance, many years ago in the case law concerning above all pregnant women but also older female workers⁴⁷.

Openness to intra-group comparisons has become increasingly evident in recent years in EU anti-discrimination case law⁴⁸. This development may facilitate an appropriate judicial response to intersectional discrimination, particularly if coupled with the Court of Justice’s readiness to take into account all relevant protected personal characteristics in the circumstances of the individual case, thereby allowing for multiple terms of comparison⁴⁹. The path is by no means smooth; nevertheless, shaping the comparative analysis in a way that, on a case-by-case basis, best brings out a holistic understanding of the legally relevant dimensions of personal identity as situated within the relevant social context appears, at present, to be the only reliable compass available to those charged with addressing intersectional discrimination.

Although it makes no explicit reference to intersectional discrimination, the Pay Transparency Directive appears to contribute to this approach. In particular, it expressly allows – alongside non-simultaneous compari-

⁴⁶ The quotation is from XENIDIS, *Multiple discrimination*, cit., p. 74. However, similar conclusions are supported by a wide range of scholarly analyses, such as – again – FREDMAN, *Intersectional Discrimination*, cit., p. 71 ff.

⁴⁷ See Case C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 8 November 1990, and Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*, 26 February 1986. In these cases concerning direct discrimination, the Court of Justice has in substance followed a *sex-plus* model, identifying unfavourable treatment, respectively, of pregnant women as compared not only with men but also with non-pregnant women, and of women approaching retirement age as compared not only with men but also with younger women.

⁴⁸ See Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, 22 January 2019, and Case C-16/19, *VL v Szpital Kliniczny*, 26 January 2021, concerning discrimination on grounds of religion and of disability, respectively.

⁴⁹ For a more detailed discussion, including an example drawn from EU case law on the Islamic headscarf, see DUBE, cit., pp. 50–51. Along the same lines, HOWARD, *Intersectional discrimination and EU law: Time to revisit Parris*, in *IJDL*, 2024, pp. 304–305.

son – for purely hypothetical comparison, that is, one not requiring the identification of an actual comparator (Article 19.3). In doing so, it renders indisputable an understanding that could previously be derived by way of interpretation from EU anti-discrimination legislation and clearly signals an openness towards comparative operations that are less readily amenable to control. The same provision further lays down that statistics and “any other evidence may be used to prove alleged pay discrimination”, thereby legitimising the use of evidentiary tools such as reliance on facts of common knowledge or situation testing⁵⁰, which may facilitate the judicial uncovering of intersectional discrimination.

As regards statistics, which are often successfully relied upon by claimants in gender discrimination cases, Directive 2023/970 is, however, disappointing. It clarifies that the legal recognition of intersectional discrimination does not entail “additional obligations on employers to gather data ... with regard to protected grounds of discrimination other than sex” (Article 3.3). This limited obligation of data disaggregation imposed on employers – a controversial issue during the drafting process of the Directive – stands in stark contrast to the need to facilitate the proof of intersectional discrimination. The criticisms levelled against this choice are therefore well founded, notwithstanding understandable concerns regarding the financial burden of broader data collection and, at least in part, the need to safeguard privacy⁵¹. However, albeit not decisively, a broader statistical reporting duty (which includes age-related data: see Article 31) is imposed on Member States. Moreover, the monitoring bodies to be established at the national level to support the application of the principle of equal pay (Article 29) must give particular attention to intra-group disparities. Importantly, monitoring bodies’ role in raising awareness of the principle of equal pay and

⁵⁰ In several decisions, the Court of Justice has grounded its reasoning on general circumstances which were not established through specific evidence in the proceedings but were treated as matters of common knowledge. This is exemplified by the leading Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, 11 November 1997, in which the Court attached weight to “prejudices and stereotypes concerning the role and capacities of women in working life” in order to support the finding that “even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates”, thereby justifying a rule giving priority in promotion to female candidates. As regards situation testing, by contrast, see DUBE, *cit.*, pp. 53–54.

⁵¹ See DUBE, *cit.*, pp. 52–53; BONARDI, *Il valore del lavoro e la questione salariale al femminile*, in *LD*, 2025, p. 656.

in effectively addressing its violations expressly encompasses intersectional discrimination. This requires them not to overlook pay disadvantages experienced by sub-groups of women, such as those belonging to ethnic minorities or women with disabilities.

EU Directives 2024/1499 and 2024/1500 explicitly require equality bodies to pay specific attention to intersectional discrimination, appropriately highlighting the importance of adopting preventive measures, promoting positive action, as well as providing assistance to victims⁵². However, these Directives do not explicitly call into question the existing division of competences among the bodies responsible for implementing the principles of equal treatment and equal opportunities with regard to the different protected grounds. Against the background of a European context in which single-ground and multi-ground equality bodies coexist – often even within the same Member State – EU legislation therefore leaves Member States with the discretion to opt for either a pluralistic or a monistic institutional model, even though the integrated competences of the latter may facilitate the combating of intersectional discrimination⁵³. To that end, the legislative encouragement of regular coordination and cooperation between equality bodies operating at different levels remains in any event beneficial⁵⁴.

Another aspect that is bound to be affected by the recognition of the intersectional dimension of presumed pay discrimination is the assessment of compliance with the principle of proportionality, which must be carried out in relation to the justifications or legal exceptions invoked to

⁵² For a comprehensive analysis of these directives, which aim to enhance the independence, efficiency, and resource allocation of equality bodies, see BIAGIOTTI, *Recent Developments in the Regulation of Equality Bodies in the European Union*, in this journal, 2025, p. 19 ff.; BORZAGA, *Equality bodies e contrasto alle discriminazioni nei luoghi di lavoro: il nuovo quadro normativo eurounitario e le possibili implicazioni per l'ordinamento italiano*, in *LP*, 2025, p. 727 ff.; D'HAENINCK, HONDEGHEM, *New directives for equality bodies: A unified future*, in *EV*, 2025, p. 131 ff.; MAZZETTI, *Verso l'uguaglianza? Le nuove direttive sugli organismi di parità*, in *LD*, 2025, p. 91 ff.

⁵³ Some Member States have begun to move in this direction, with the specific aim of facilitating the tackling of multiple and intersectional discrimination, as noted by XENIDIS, *Multiple discrimination*, cit., p. 56. For the Italian debate on this topic – prompted many years ago by IZZI, *Eguaglianza e differenze nei rapporti di lavoro*, *Jovene*, 2005, pp. 443–444 – see, CALAFÀ, PROTOPAPA, *Dalle origini alle direttive di “terza generazione”: gli attori delle politiche per la parità*, in *RGL*, 2024, I, p. 419 ff.; on advantages and limits of multi-grounds equality bodies see BIAGIOTTI, cit., p. 24 ff.

⁵⁴ Along the same lines in the Italian context, see GABRIELE, *Le discriminazioni multiple nell'intreccio delle fonti*, in *DML*, 2021, pp. 376–377.

rule out the unlawfulness of the contested treatment. This issue is mentioned in recital 25 but is not further developed in Directive 2023/970. However, it was addressed by Advocate General Kokott in her Opinion in *Parris*, where she argued for a stricter standard of judicial review as regards possible justifications. She observed that “the combination of two or more grounds for a difference of treatment ... may also mean that, in the context of the reconciliation of the conflicting interests for the purposes of the proportionality test, the interests of the disadvantaged employees carry greater weight, which increases the likelihood of undue prejudice to the persons concerned, thus infringing the requirements of proportionality *sensu stricto*”⁵⁵.

As noted earlier, this line of reasoning did not influence the Court of Justice’s decision. In the case in question, the Court halted at an earlier stage, refusing to recognize that a situation of disadvantage arising from the combination of two protected grounds ought to have been assessed in a different light. However, there have been instances in which the Court, even without explicitly reasoning in intersectional terms, has nonetheless given concrete weight to the co-existence of protected grounds, particularly through a rigorous application of the proportionality test⁵⁶. More generally, this enhanced level of scrutiny would seem to be appropriate in all cases of multi-ground discrimination, thus encompassing not only intersectional discrimination in the strict sense, but also additive discrimination⁵⁷.

⁵⁵ Stated in the Opinion of Advocate General Kokott in Case C-443/15, *Parris v Trinity College Dublin*, para 157. The idea that judicial review standards must be heightened subsequently resurfaced, albeit without any explicit reference to proportionality, in “*Shadow Opinion of former Advocate General Sharpston: headscarves at work (Cases C-804/18 and C-341/19)*” – available at: <https://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html> – which was drafted in relation to the *Wabe* and *MH Müller* cases before the file was officially assigned to Advocate General Rantos, and later made public in order to contribute informally to the legal debate. On the notion of an “enhanced level of scrutiny to the sequential aspects of the justification being advanced by the employer,” see in particular para 270.

⁵⁶ See in particular Case C-152/11, *Johann Odar v Baxter Deutschland GmbH*, 6 December 2012, paras 63–70, as highlighted by BRIBOSIA, MEDARD INGHILTERRA, RORIVE, *La discrimination intersectionnelle en droit: mode d’emploi*, in *RTDH*, 2021, p. 266; see also Case C-312/17, *Surjit Singh Bedi v Bundesrepublik Deutschland*, 19 September 2018, paras 63–78, as noted by XENIDIS, *Intersectionality from critique to practice: Towards an intersectional discrimination test in the context of ‘neutral dress codes*, in *EELR*, 2022, n. 2, p. 34.

⁵⁷ For a suggestion along these lines, see BRIBOSIA, MEDARD INGHILTERRA, RORIVE, *cit.*, pp. 266–267.

Scrutiny of justifications for treatments that produce disadvantages on more than one ground is complicated by the fragmentation of EU antidiscrimination law and the heterogeneity of the rules established in this connection for certain protected characteristics. The heightened judicial review required in cases of intersectional discrimination may call for a cumulative application of the justification criteria associated with each individual ground of discrimination, in line with an approach that has begun to emerge in certain Member States⁵⁸. Nonetheless, assessing compliance with the principle of proportionality is a particularly sensitive issue, and the Pay Transparency Directive's complete silence on this point does little to encourage the judicial application of the newly introduced prohibition of intersectional discrimination.

The final potential impact of the intersectional nature of discrimination contemplated by the Pay Transparency Directive concerns remedies, that is the consequences of a proven breach of the principle of equal pay for equal work or work of equal value between men and women, both for the claimant as the victim and for the employer held liable. Given that EU equality law states that remedies must always be effective, proportionate, and dissuasive, the Pay Transparency Directive explicitly requires that the intersectional discrimination be taken into account: first, as one of the relevant factors to be considered when awarding full compensation or reparation to the worker (Article 16.3); and second, as one of the aggravating or mitigating factors that may be assessed in determining the penalty to be imposed on the employer (Article 23.3).

It should be noted that compensation or reparation must also cover non-material damage, and that the simultaneous harm to multiple dimensions of personal identity may arguably affect how such damage is quantified. Scholars have nevertheless pointed to various other reasons justifying heavier sanctions in cases of intersectional discrimination, including its insidious nature which makes it more difficult to recognize⁵⁹. According to

⁵⁸ Specifically, as regards the German regime and the guidance that may be drawn from it, see SCHIEK, *On uses, mis-uses and non-uses*, cit., pp. 92–93, who explains how this principle could have been applied in *Parris* by subjecting discrimination on grounds of sexual orientation and age to a more stringent proportionality review. The example is particularly instructive, given that in that case intersectional discrimination results from the combination of direct and indirect discrimination.

⁵⁹ See, among others, DUBE, *cit.*, p. 55, and BRIBOSIA, MEDARD INGHILTERRA, RORIVE, *cit.*, p. 267 ff.

a different view, however, it would be misguided to replace the need for a case-by-case determination of compensation for intersectional discrimination with a rigid presumption in favour of a higher quantification of damages, detached from the severity of the concrete disadvantage suffered by the claimant⁶⁰. Far more persuasive, by contrast, is the same author's recommendation to recall the importance of designing remedies that are structurally and proactively capable of addressing the multidimensional disadvantage they are intended to redress⁶¹. Given the European Union's lack of competence with regard to sanctions, this issue ultimately falls to the individual Member States, where, in the context of single-ground discrimination, judicial remedies already exist that are open-ended in nature (and therefore capable of being tailored to the needs of the case at hand), have a collective scope, and serve a preventive function⁶².

More generally, the adoption of preventive measures remains the primary and most appropriate course of action in relation to all forms of discrimination. This need is, however, particularly acute in the context of intersectional discrimination, where ensuring substantive equality requires uncovering the co-constituted structures of disadvantage and systems of power, and where litigation often proves especially challenging.

4. *A promising starting point for advancing anti-discrimination protection through the case law of the Court of Justice*

As noted above, the guidance on the handling of intersectional discrimination offered by Directive 2023/970 is very limited and undoubtedly re-

⁶⁰ See ATREY, *Intersectional Discrimination*, cit., pp. 198–201, who criticises, on these grounds, the decision of the Ontario Human Rights Tribunal in *Baylis-Flannery* (above, n 20) concerning the calculation of damages for mental anguish awarded to the Black woman who was harassed, arguing that it cannot be taken for granted that such anguish is greater simply because the claimant was targeted on both grounds of race and sex.

⁶¹ See again ATREY, *Intersectional Discrimination*, cit., p. 201 ff., who thereby draws attention to the more general need not to overlook, at the remedial stage, the situation of the disadvantaged group to which the claimant belongs, providing examples drawn from various legal systems.

⁶² In Italy, these characteristics are reflected, for example, by the judicial order provided for under Article 38 of Legislative Decree No 198/2006, which may be issued at the conclusion of proceedings concerning collective gender discrimination and has, precisely because of those characteristics, been regarded as a form of compulsory positive action.

quires further elaboration. Nonetheless, the explicit prohibition introduced by Article 3.2(e) of this Directive, and reaffirmed in identical wording by the Equality Bodies Directives 2024/1499 and 2024/1500, maps out a pathway that not only Member States, but also the Court of Justice of the European Union, are expected to follow. In this respect, the role of the Court of Justice appears particularly significant, given the widespread tendency to defer to it on the most conceptually demanding issues and the decisive influence that its rulings exert across all national legal systems⁶³.

In reality, none of the well-known precedents in which the Court was confronted with situations involving an objective overlap between protected grounds is a particularly good fit for the field of gender pay equality, where the prohibition of intersectional discrimination is expressly established. In *Parris*, the dispute concerned remuneration, as it related to access to an occupational pension scheme. However, alongside age, the relevant protected ground was not gender but sexual orientation.

By contrast, in the six cases concerning workplace penalties levied on women for wearing the Islamic headscarf in violation of corporate neutrality policies⁶⁴, there was a clear connection to the employee's gender (and ethnic background), even though the cases were framed as instances of religious discrimination. Nevertheless, these disputes did not directly involve the sphere of remuneration.

In the *Wabe* case, upon closer examination, the disciplinary suspension imposed on a kindergarten teacher for wearing a headscarf in breach of a

⁶³ For a more detailed discussion on this point see XENIDIS, *From critical theory*, cit., pp. 39–41, which sets out the reasons underlying the pronounced “transformative potential of doing intersectionality in supranational anti-discrimination litigation”, with particular reference to proceedings before the Court of Justice (see p. 24 for the quoted expression).

⁶⁴ Case C-157/15, *Achbita v G4S Secure Solutions*, 14 March 2017; Case C-188/15, *Bouagnaoui*, 14 March 2017; Joined Cases C-804/18 *IX v Wabe* and C-341/19, *MH Müller Handels GmbH v MJ*, 15 July 2021; Case C-344/20 *LF v SCRL*, 13 October 2022; Case C-148/22, *OP v Commune d’Ans*, 28 November 2023. There is an extensive body of literature on this line of case law, much of it critical: among the countless commentaries on the first twin rulings, see DORSEMONT, *Freedom of religion in the workplace and the Court of Justice of the European Union: A return to the principle of Cuius regio, eius religio?*, in *RDCTSS*, 2017, p. 200 ff., <https://journals.openedition.org/rdctss/2354>; whereas, turning to the most recent judgment, see RINGELHEIM, *Headscarf bans in the public workplace before the Court of Justice: OP v Commune d’Ans or the Art of Ambiguity?*, in *ELLJ*, 2024, p. 912 ff. With particular attention to the intersectional perspective see GUTIERREZ-SOLANA, *Unweaving Complex Discrimination at the Court of Justice of the European Union: the Islamic Headscarf at Work*, in *FemLS*, 2021, p. 205 ff., and XENIDIS, *Intersectionality from critique to practice*, cit., p. 55.

ban on religious symbols had an immediate impact on her remuneration. A similar situation, if brought before the courts again, could thus potentially fall within the scope of Article 3.2(e) of the Pay Transparency Directive. Irrespective of this potentially extensive application of the Directive, the prohibition of intersectional discrimination enshrined therein undoubtedly represents a clearer articulation of the objective of ensuring that those situated at the intersection of multiple axes of disadvantage are not excluded from the protection afforded by European equality law, precisely because they may be in greater need of it. That objective, already articulated in broad terms in numerous non-binding sources and further reinforced by the Commission's decision to frame intersectionality "as a cross-cutting principle" of its action (as noted above, § 1), has marked an objective leap forward with the first legal recognition of intersectional discrimination. Beyond constituting a point of arrival, such recognition nonetheless inevitably represents a starting point as well, including with regard to the scope of its operative reach.

An interpretation extending the prohibition of intersectional discrimination beyond the formal scope of the Pay Transparency Directive now appears to be viable and supported by compelling arguments.⁶⁵ The evolution of EU anti-discrimination law as a whole has shown a clear trend towards harmonisation, a trend that can already be observed with regard to intersectionality in the Equality Bodies Directives. Moreover, the Court of Justice has consistently demonstrated a strong commitment to ensuring the effectiveness of EU anti-discrimination law, often by overcoming legal barriers whose underlying rationale remained uncertain⁶⁶.

⁶⁵ In a similar vein, see HOWARD, *cit.*, p. 308; see also DUBE, *cit.*, p. 56.

⁶⁶ See, for instance, the application of the prohibition of indirect discrimination under Directive 79/7/EEC on the principle of equal treatment for men and women in matters of social security, where indirect discrimination has never been explicitly defined: Case C-389/20, *CJ v Tesorería General de la Seguridad Social (TGSS)*, 24 February 2022. See also, and more significantly, the extension to workers who are carers of persons with disabilities of the duty of reasonable accommodation provided for persons with disabilities under Directive 2000/78, as recognised in the recent judgment in Case C-38/24, *Bervidi*, 11 September 2025. More generally, on the Court of Justice's engagement with addressing the "protective gaps associated with the enforcement of EU labour law", see KOUKIADAKI, *Enforcement of EU Labour Law: Legal foundations and the role of the CJEU*, in *ELLJ*, 2024, p. 639. Within the specific field of non-discrimination, see instead KOLLONAY-LEHOCZKY, *Enforcing non-discrimination*, in RASNAČA, KOUKIADAKI, BRUUN, LÖRCHER (Eds.), *The Effective Enforcement of EU Labour Law*, Bloomsbury, 2022, p. 213 ff.

The need to take into account the synergistic combination of multiple protected personal characteristics – stemming from the new prohibition of intersectional discrimination – now effectively prevents European judges from replicating certain lines of reasoning that had been adopted in the past. This applies, first and as already noted, to the reasoning in the *Parris* judgment, which held that claims of alleged multi-ground discrimination must necessarily be disaggregated into separate claims of single-ground discrimination. Also requiring reconsideration is the conviction – first explicitly expressed in *Wabe* and *Müller* and later reaffirmed in *OP*, the only two rulings on wearing the Islamic headscarf at work in which the referring courts openly raised the gender dimension of the alleged religious discrimination – that, in assessing a violation of the prohibition of religious discrimination under Directive 2000/78, no account may be taken of a ground (such as gender) that falls outside the Directive’s scope and is protected by another legal instrument not invoked in the proceedings⁶⁷. It is true that, in such cases, it would have been appropriate to refer to all the relevant legal sources already at the stage of formulating the preliminary questions⁶⁸; however, the formal obstacle to an intersectional approach could have been overcome by the Court through a reformulation of those questions, as is not uncommon when it becomes necessary to correct the approach adopted by the referring courts. In any event, a siloed approach to the various sources of anti-discrimination law undermines the rationale of their potential interconnection, now endorsed by the definition of intersectional discrimination and, in particular, by the combination of different protected grounds, as laid down in Article 3.2(e) of the Pay Transparency Directive.

The issue of unfavorable treatment experienced by Muslim women workers who refuse to comply with employer-imposed rules on religious and ideological neutrality in workplace dress codes – an issue at the core of a line of EU case law whose outcomes have often been regarded as unsatis-

⁶⁷ Joined Cases C-804/18, *IX v Wabe*, and C-341/19, *MH Müller Handels GmbH v MJ*, paras 57–58, where the Court fully aligns with the Opinion of Advocate General Rantos, 25 February 2021, para 59; Case C-148/22, *OP v Commune d’Ans*, paras 42, 48–49, where the Court once again follows the Opinion of Advocate General Collins, 4 May 2023, paras 35–38. Notably, none of these rulings take into account the explicit references to gender contained in Recital 3 and Article 19.2 of Directive 2000/78.

⁶⁸ Similarly, see BELLO, *Discriminazioni e diritto*, cit., p. 41.

factory⁶⁹ – offers the Court of Justice a particularly important, albeit highly sensitive, opportunity to engage with the recognition of intersectional discrimination.

The risk of “double discrimination” – or even “triple discrimination” on the basis of religion, gender and ethnic origin – has already been brought to the Court’s attention in precisely these terms by two Advocates General⁷⁰. Furthermore, as previously noted, some encouragement to broaden the perspective beyond the religious ground has come from certain referring judges. The most thought-provoking reflections, although still preliminary and ultimately disregarded by the Court, were offered by Advocate General Medina in the *LF* case. There, she underscored the importance of intra-group comparison to extend equality protection “to the less privileged individuals within a particular group”⁷¹ and called for a realistic acknowledgment of the serious social exclusion that may result for women belonging to ethno-religious minorities when the issue is underestimated⁷².

⁶⁹ In addition to the critical scholarship cited at n. 64, confirmation of their inadequacy can be found in the broader proposals to amend the current regulatory framework by extending to religion, the duty of reasonable accommodation established under EU anti-discrimination law for persons with disabilities. See ALIDADI, *Religion, Equality and Employment in Europe. The Case for Reasonable Accommodation*, Hart, 2019; DONEGAN, *Thinly Veiled Discrimination: Muslim Women, Intersectionality and the Hybrid Solution of Reasonable Accommodation and Proactive Measures*, in *EJLS*, 2020, p. 143 ff.; and, highlighting recent developments in the case law of the Italian Court of Cassation, MARINELLI, DOLAZZA, *Accomodamenti ragionevoli e discriminazioni per motivi religiosi sul luogo di lavoro*, in *DLRI*, 2022, p. 377 ff.

⁷⁰ See, respectively, the Opinion of Advocate General Medina in Case C-344/20, *LF v SCRL*, 28 April 2022, para 66, which emphasizes that “double discrimination is a real possibility;” and the aforementioned Shadow Opinion of former Advocate General Sharpston in Cases C-804/18 and C-341/19, *Wäbe and MH Müller*, 23 March 2021, paras 270-276, which diverges significantly from the official Opinion of Advocate General Rantos on the same proceedings, 25 February 2021.

⁷¹ Thus, the Opinion of Advocate General Medina in Case C-344/20, *LF v SCRL*, para 39. It should be noted, however, that her reasoning on infra-group comparison (paras 35-42) is primarily aimed at urging the Court to frame the case as one of direct religious discrimination, rather than indirect discrimination, more than as guidance on intersectionality.

⁷² The words of Advocate General Medina in her Opinion in Case C-344/20, *LF v SCRL*, para 66, are worth quoting: “if employers impose internal neutrality rules as a generalised policy, Muslim women may in reality not only experience ‘particular inconveniences’, but a deep disadvantage to becoming employees. That may lead in turn to setting them apart from the labour market – a source of personal development and social integration – resulting then in discrimination going beyond religion and extending also to gender.”

In the face of these developments, further reinforced by the approach adopted in the case law of major international institutions which have read employment-related disputes concerning the Islamic veil through an intersectional lens, the avoidance strategies repeatedly deployed by the Court of Justice have been regarded as surprising⁷³. Indeed, in cases falling within other areas of anti-discrimination law, the Court has displayed both interpretative courage and rigour. By contrast, when particularly sensitive issues – such as those relating to religion – come to the fore, it appears instead to systematically favour a compromise-oriented approach, reflecting their political salience and their potential impact on public opinion⁷⁴. This thus seems to constitute a more contested terrain.

New light, however, could be shed on cases concerning the Islamic headscarf in the workplace by taking seriously the commitment to combating intersectional discrimination, a responsibility now explicitly embraced by the European legislator. This calls for a more deliberate and informed development and application of the legal model articulated only in embryonic terms in the Pay Transparency Directive, together with closer attention to the obligations it entails. In particular, as illustrated above, this includes conducting contextual and situated analyses; making intra-group comparisons that reflect the multiple identities of alleged victims of discrimination; and applying more rigorous scrutiny to justifications under the proportionality test.

As is well known, giving practical effect to intersectionality in anti-discrimination law is not a task that can be approached through improvisation. Yet the die has been cast, and the Court of Justice can no longer overlook this evolving legal landscape in its future case law.

⁷³ See XENIDIS, *Intersectionality from critique*, cit., pp. 34 and 36, which also refers to specific cases in the evolving jurisprudence of international institutions.

⁷⁴ In this sense, see BARBERA, BORELLI, *Principio di eguaglianza e divieti di discriminazione*, WP CSDLE “Massimo D’Antona”.IT, 2022, n. 451, pp. 75–76.

Abstract

This article examines a pivotal development in EU equality law: the first explicit prohibition of intersectional discrimination introduced by Directive (EU) 2023/970 on strengthening the principle of equal pay between women and men. After clarifying the relevant terminology used in the context of multi-ground discrimination, it analyses the conceptual ambiguities surrounding the definition of intersectional discrimination and considers how they may be addressed. In light of the Directive's rather vague provisions referring to intersectional discrimination, the article then seeks to sketch the basic contours of a regulatory model applicable in such situations, without purporting to provide exhaustive answers to the many open questions that remain. It concludes by explaining why the prohibition of intersectional discrimination introduced in the specific context of gender pay equality should influence the case law of the Court of Justice of the European Union well beyond that field. It therefore advocates a purposive and expansive interpretation of the new prohibition, capable of ensuring effective legal protection for workers situated at the intersection of multiple axes of disadvantage.

Keywords

EU law, prohibition of intersectional discrimination, equal pay, purposive and expansive interpretation, religious symbols in the workplace.