RightServicing
from a lawyer's perspective

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1 Foreword – RightServicing – A Lawyers Perspective

On behalf of the IBM Cúram Research Institute, I am pleased to introduce this report, "RightServicing, A Lawyers Perspective", by Professor Danny Pieters, Professor Paul Schoukens, Mrs Lina Kestemont and Mrs Kirsten Vanden Bempt with the assistance of Mr Pieter-Jan Germaeux.

In April 2012, the IBM Cúram Research Institute formally introduced the RightServicing concept with a report launched at the International Social Security Association (ISSA) ICT conference in Brasilia, Brazil. RightServicing is a new business model approach for social protection organisations to deliver a differential service response. RightServicing represents a set of organisational attributes, each a capability, needed to deliver an optimal level of assistance for people to achieve appropriate and sustainable social outcomes.

A differential service response is one calibrated to match the level of need (from both a social outcome and service delivery perspective) and stands in contrast to the one-size-fits all approach. The RightServicing business model for differential response brings about:

- A reduction of over-servicing the majority, through the automation of low risk, straightforward and simple interactions;
- An increase in deep and personalised support to address disadvantage - people who suffer disadvantage are often under-serviced by the social program management system; and
- A largely self-managed servicing approach to those who have been affected by a social risk and are able and would prefer to manage their affairs.

RightServicing is a significant update to the traditional one-size-fits-all process model. Not all citizens need the same level of support to achieve a desired social outcome and the amount of service provided should vary according to the social context of individuals and their families. The concept challenges traditional thinking in social protection of insurance for social risks.

The concept of RightServicing emerged as a way to rationalise the management of the multiple forms of social programs that exist today (such as social insurance, social welfare, social assistance), to meet the needs and wants of individuals and communities while maintaining societal level outcomes within the constraints of societies ability to fund those same programs.

Since the April 2012 launch, the RightServicing concept has been well received throughout the global social protection community. However, as a new concept challenging the status quo, new legal based questions were raised. Could RightServicing be applied within a rights based social security model? Was RightServicing only applicable in Anglo-Saxon countries with a bias towards a safety net and social assistance based social protection model? Does the application of Segmenting, the central tenet of RightServicing, potentially breach any laws and/or international treaties and covenants on the grounds of unfair discrimination against certain groups? Can data and information relating to individuals be shared across

different organisations to provide a better and more informed service response without breaching privacy and data protection laws?
These questions and others needed to be addressed for RightServicing to be given due consideration in particular within organisations operating within the acquired rights and contributory social insurance model. To address these questions we turned to the European Institute of Social Security (EISS), a pre-eminent network of specialists with a variety of different professional and academic backgrounds in the field of social security and social protection throughout Europe (and beyond).

Professors Pieters and Schoukens together with their EISS colleagues have examined RightServicing through the lens of their extensive legal experience in social protection and human rights. In their opening remarks they state "The RightServicing approach is original and deserves our attention. However, when taking the RightServicing route, there are some (legal) considerations to be taken into account". They presented their interim findings at the International Social Security Forum held in Warsaw in October 2012.

Their final report examines legal considerations across four major subject areas:

- Data and privacy protection law
- Equal treatment and non-discrimination
- Conditionality of social security rights

In examining each area, the research team has referred to case law, articles, treaties and conventions from sources such as:

- Directives of the European Parliament and of the Council
- Council of Europe
- European Convention of Human Rights
- European Court of Human Rights
- Court of Justice of the European Union
- Committee on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights
- Convention on the Elimination of All Forms of Discrimination Against Women
- Convention on the Elimination of All Forms of Racial Discrimination
- ILO
- OECD

The subject areas of data and privacy protection, equal treatment and non-discrimination and conditionality are all topics of considerable interest to social administrators, independent of the RightServicing concept. Readers of the report will find value in the analysis of these complex and important contemporary issues impacting social protection around the world even if they are not considering the RightServicing concept per se.
This deep level of analysis reflects the complexity social program administrators face as they change traditional business models, built up over many years, to a RightServicing based approach. However rapidly changing social and economic conditions as described in the original RightServicing report, leave policy and service delivery experts with little choice other than to explore alternatives to break the one-size-fits-all paradigm.
The EISS team concluded that RightServicing principles such as Segmenting can be justified providing there is compliance with fundamental rights and freedoms. To do this

requires administrators to be pro-active in addressing potential legal questions. They conclude an initiative is hardly ever absolutely legally safe [i.e. zero probability of legal challenge], nor absolutely legally impossible. This conclusion demands innovation in policy development and service delivery. RightServicing initiatives need to be carefully designed, described and justified (and rightly so) in terms of the legal considerations. Otherwise the barriers to change for reforming social protection systems will remain.
This report continues a series of initiatives in which IBM and the IBM Cúram Research Institute has collaborated with the EISS. Our aim in commissioning this report is to provide new and valuable insights into the RightServicing business model.

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2 Introduction: RightServicing from a lawyer's perspective

2.1 Summary

The RightServicing approach is original and deserves our attention. However, when taking the RightServicing route, there are some (legal) considerations to be taken into account. This research project aims at clarifying these considerations.

In a first stage it is important to make clear what we understand by the concept of Right Servicing (1). The RightServicing approach needs to be analyzed from a legal perspective. This is in the first place the case for its crucial, but also most problematic characteristic, namely the aspect of segmentation (2). The other characteristics of RightServicing may also benefit from legal scrutiny and will therefore be further investigated (3). Finally, in the concluding part we make a concrete proposal for a research project including a legal screening of the RightServicing approach (4).

2.2 The RightServicing concept

It is important to single out what is essentially different in the RightServicing approach. In the formal release at the ISSA conference on Brasilia (17-20 April 2012) we read:

"*RightServicing represents a set of organizational attributes, each a capability, needed to deliver an optimal level of assistance for people to achieve an appropriate and sustainable social outcome.*

A RightServicing business model enables a differential service response. A differential service response is one calibrated to match the level of need (from both a social outcome and service delivery perspective) and stands in contrast to the one-size-fits all approach. The RightServicing business model for differential response brings about:

- *A reduction of over-servicing the majority, through the automation of low risk, straightforward and simple interactions;*
- *An increase in deep and personalized support to address disadvantage - people who suffer disadvantage are often under-serviced by the social program management system; and*
- *A largely self-managed servicing approach to those who have been affected by a social risk and are able and would prefer to manage their affairs.*

RightServicing is a significant update to the traditional one-size-fits-all process model. Not all citizens need the same level of support to achieve a desired social outcome and the amount of service provided should vary according to the social context of individuals and their families."

The idea is further concretized in 9 characteristics. We read in the Brasilia release:

"*RightServicing as a business model was defined in the context of nine characteristics and these were validated throughout the research*."

These 9 characteristics are summarized in the following table:

Characteristic	Description
Segmenting	*Grouping people together with similar needs and wants*
Fast-tracking	*Getting through the system with the minimum of fuss*
Addressing Complexity	*Complexity of people's circumstances is everywhere and must be recognised*
Managing Risk	*Dynamic and focused at better service and compliance*
Accessing	*How people access and consume the social system*
Automating	*Technology to eliminate manual processing and reduce process cycle times and reduce cost*
Predicting	*Early intervention to stop social disadvantage - prevention is better than finding a cure*
Micro Programs	*Designing social solutions to achieve desired outcomes and address complex problems*
Leveraging the Ecosystem	*Collaboration and sharing with other agencies and stakeholders*

The characteristics cannot be considered of equal or exchangeable importance.

"*Segmenting is the highest order RightServicing characteristic as it defines target markets requiring attention. It is a mechanism for identifying which groups of people are underserviced and those over serviced. Segmenting enables policy makers and service delivery administrators to see the people they serve in terms of their collective needs and wants rather than as beneficiaries of social programs.*

It is important to note that segmenting is not a definitive way of categorizing people and should not be used as such. People will most likely fit into multiple segments. Segmenting provides guidance on the products and services required to service a client population. Actual delivery of these products and services is governed by other RightServicing characteristics.

Examples of segmentation include (not exhaustive):

- ***Program*** *– Unemployed, retired, families*

- ***Service mode*** *– Third party, agent, staff assisted, self*
- ***Societal group*** *– Working age, baby boomers, Gen X, Gen Y*
- ***Geographic*** *– Metropolitan, rural, remote*
- ***Ethnicity*** *– Indigenous, migrants*
- ***Life event*** *– Birth, marriage, separation, employment, death*
- ***Location specific*** *– Local community, housing estate, apartment block*
- ***Disability*** *- Physical, intellectual, birth defect, accident*
- ***Gender*** *– Male, female, transsexual*
- ***Sexual orientation*** *- Hetero, bi-sexual, gay, lesbian*
- ***ICT adoption*** *– Early adopters, followers, no access*
- ***Income*** *– High, medium, low, income support only* "

2.3 Segmentation as crucial, but also problematic key

As appears from the above the segmentation characteristic of the RightServicing approach is crucial for the way the other characteristics can be implemented.

Yet segmentation calls for closer attention from a lawyer's point of view. The questions raised are in conjunction with the use made of such segmentation, in other words segmentation will be related to the other characteristics of the RightServicing approach.

A first issue calling for attention relates to the differentiation criteria for defining the groups. The examples given may illustrate this problem. Some criteria such as ethnicity, gender and sexual orientation, are from a legal perspective "critical" or "suspect": is it allowed for the state or its agencies to register these? It goes without saying that if the mere registration of these is outlawed, the whole segmentation on the basis of these criteria is to be abandoned. If these features can be registered, it is likely that this registration will be subject to conditions about the use of such registration. Privacy protection may and will pop up in this context. It calls for further examination which criteria for segmentation are completely unproblematic, which are prohibited and which take an in-between position.

A next issue calling for examination relates to the use that will be made of the segmentation. If people are grouped according to legally acceptable criteria, it remains to be seen whether it is possible to use the information on an individualized basis. In other words, one thing is to group people according to some criteria, another thing is to use that information in a way that one goes back to the individual persons belonging to the group. A use of segmentation can be legally acceptable when it aims at forecasting over-all expenditure in the future, but at the same time it may be highly questionable when aiming at another (individualized) approach of the persons belonging to the group.

A third area of legal concern with segmentation is more related to the interaction with the other characteristics of the RightServicing approach and can be summarized under the heading "principle of equality" or "principle of non-discrimination". If we apply

segmentation. In order to have persons dealt with in a differentiated way according to the group they belong to, this may lead to a better access, a better counseling, fast-tracking etc. with positive over-all effects in terms of policy, but might be perceived by the individuals concerned as discriminatory: why do I get this simplified/complex attention that my colleague does not? This is all the more a problem as what some may see as a right or a self-evident policy, might be perceived by others as creating duties and imposing a stricter control.

Although the RightServicing approach certainly aims at a better approach both for the administration, the concerned persons and the concerned society as such, on an individual level segmentation may be viewed as persecution or witch hunt. For example, let us suppose that black urban people, female rural workers or unemployed of foreign decent, would tend to remain longer in work incapacity schemes, when no special initiatives of reintegration are taken. It might be in line with the RightServicing approach to follow up all new cases of work incapacity of black urban or female rural workers, or unemployed of foreign decent, in a more pro-active way than for people not belonging to these groups. When doing so however, the concerned targeted groups may feel discriminated as they will e.g. be confronted with rehabilitation measures, which are proposed only much later to others.

From a policy point of view the RightServicing approach makes sense, but how to make individuals perceive it in that way? Moreover, in some social security systems, benefit recipients are granted the right to be left alone for a certain period of time, before they can be challenged again on their work incapacity or unemployment; how to reconcile this with differentiation on the basis of segmentation?

2.4 Some other aspects of the RightServicing calling for legal attention

Whereas we hold the problems related to segmentation as the more important aspect when we investigate the RightServicing approach as lawyers, this does not take away that some other characteristics of RightServicing also need to be looked at from a legal perspective. Let us mention some of them popping up when reading the yet available parts of the RightServicing Brasilia release.

One first problem arising relates to the pooling and sharing of information. Various characteristics of RightServicing seem to refer to such actions. For example, we may encounter difficulties related to the pooling and sharing of information. when referring to the complexity of personal circumstances of the people concerned, when improving access to certain types of information, when designing micro programs or when leveraging the Ecosystem. Pooling and sharing of information, data transfer between agencies etc. will in most countries call for scrutiny under privacy protection law. That such a data transfer, information pooling and sharing may be very desirable from a policy point of view and may even result in positive results both for the administration

and the concerned people, does not take away that serious privacy protection hurdles may have to be taken in this respect.

When looking at the "accessing" component of the RightServicing approach, we understand that a differentiated approach may lead to an optimal access of the social programs (we are a bit reluctant to also speak of an optimal "consumption" in this context). Yet one should realize that such a differentiated approach has already been adopted by many social security institutions that interact with the socially protected via phone, e-mail, internet, letters and pamphlets and manned face-to-face contact points. When the choice of the communication channel is at the end of the socially protected, this does not call for special attention, at least if the follow-up is not differentiated according to the way one accessed the system. The situation changes however when not the socially protected person chooses, but when it is the administration deciding (on the basis of segmentation e.g.) how people are expected to contact the administration, possibly excluding or at least hindering access via other ways. Moreover, one should never forget that accessing the system may not only be the start of a good, efficient and successful contact between the socially protected and the administration, it may also be at the start of attempts to abuse or defraud the system. Especially in case of self-management, some risks of fraud may deserve an accrued attention, such as e.g. identity fraud.

Finally we would also like to make a remark concerning RightServicing, which as such is less a legal remark, but in our opinion also calls for further reflection. The RightServicing paper sees the relation between government and citizens as in the one direction (citizen to Government) determined by the needs, wants and obligations of the citizen, and in the other direction determined by the social safety net programs. We read in this context:

"*Governments, as the representative of society, have a social contract with the citizens to provide the essentials of social and economic development. Citizens in turn have obligations to government such as paying taxes and complying with the law*. *Within this relationship is the important provision of a social safety net designed to respond to the needs and wants of the people. Governments have administrative arrangements through policy ministries and service delivery agencies to provide services and respond to needs and wants*."

Although more implicitly than explicitly, the approach taken is very much inspired by social services and social assistance, i.e. means tested benefits approach, rather than by a social security rights approach. In such an approach the goal to be pursued by government/administration may be rather obvious: a safety net, banning of poverty, full employment, health etc. The goal of many social insurance schemes may be less obvious and may be perceived in different ways by the administration (as debtor of the benefit) and the socially insured (as the one having a right, a legal claim on the benefit). Let us give a (controversial) example: in a pure social insurance approach, an unemployment benefit scheme may pursue the reinsertion of the unemployed into a

good and durable employment as a societal goal, while the concerned persons may see the attribution of an income replacement when they remain unemployed as a goal of the system. The two goals need not to contradict each other, but may get into conflict in a RightServicing approach when a person would like to (ab)use the scheme in order to have a period to re-orient his/her life and career, whereas from a macro perspective one might like to get the person as soon as possible back to (decent) work. When we deal with unemployment schemes of a non-social insurance nature, this may not be a conflict too difficult to solve, as in such a case the macro perspective will prevail; but what about social insurance schemes to which workers have contributed for many years for providing a replacement income when out of work? Probably we shall also have to solve the conflict in this case in a macro perspective, but it will be less evident and the solution will be more nuanced. We have the feeling that this specificity of social insurance benefit schemes might be somehow neglected in the presented RightServicing approach.

2.5 Proposal for a legal screening

In the above we have tried to illustrate that the valuable RightServicing approach leads to some considerations from a legal perspective. This is certainly the case for its key characteristic of segmentation. We already pointed out various concrete areas of legal concern.

We propose to further develop these issues in order to see to what extent they call for readjustments, clarifications or simply no adaptation but legal justification. When doing so, one has to determine the legal framework in which the issues have to be tested.

We will not go into the details of any national legislation. We will rather work on the basis of legal principles that are common to the Western European countries, as amongst others reflected in EU law, the law (both hard and soft) developed in the framework of the Council of Europe and the case law of the Court of Justice of the European Union (CJEU, formerly known as the European Court of Justice) and the European Court of Human Right (ECtHR). Where feasible we may also include constitutional law of states. However, we will not elaborate on lower national legislation or case law since, in case a government would like to introduce elements of RightServicing, it will have to provide a legal (often statutory) base for it. Consequently, our legal screening will remain at the level of principles.

Yet we also intend to indicate the directions into which the segmentation characteristic may be adapted in order to answer to the identified legal concerns. In that sense our conclusion may have a direct and practical effect.

We will first of all elaborate on the privacy related questions that are related to the RightServicing approach (Chapter 1). Hereafter we will briefly discuss the RightServicing's profiling aspect (Chapter 2), followed by an extensive investigation of

the possible problems related to discrimination (Chapter 3). Finally, we shall go into the details of the conditioning aspect of the RightServicing approach (Chapter 4).

3 Data protection and privacy

3.1 Introduction

RightServicing aims at providing a more individualized service. In order to do so, one needs the necessary information/data on the individual/group of persons in order to be able to segment the clients and provide a service more in line with the needs of the (individual) client. The collection, storage and use of personal data is a must in order to make segmenting possible and to make RightServicing work.

The questions asked in this chapter will be on whether data protection and privacy law might be a hindrance to the RightServicing approach. Which data can be collected, stored and used by a social security administration? Under which conditions will the processing of this data be possible? In case the processing of certain data is prohibited: are there justifications to process the data anyway? What about the right to privacy of the individual?

When taking a first glance at the legal instruments, it is clear that processing of personal data as such is not forbidden. One needs to meet several principles/conditions under which data processing is allowed. For our study, special attention will have to be given to the rules on the data processing of what is referred to as "special categories of data" or "sensitive data". Segmenting is indeed related to elements which are considered to be "sensitive data" (e.g. ethnicity, sexual orientation). The processing of this data is prohibited except in exceptional cases (e.g. "explicit consent" (see Directive 95/46/EC)).

It will also be important to check whether the "right to privacy" has not been infringed. Both data protection and right to privacy are indeed separate rights on a European level (EU Charter of Fundamental Rights), but since the right to data protection has evolved out of the right to privacy, they remain intertwined. This is especially noticeable when the case law comes into the picture. In the past, the European Court of Human Rights has developed many of the principles of data protection laws, while the European Court of Justice, which rules on the Data Protection Directive (Directive 95/46/EC), has on different occasions found the data processing to be an infringement of the private life.

This chapter will therefore be set up as follows: first, a general introduction to data protection and the right to privacy will be made; secondly, three legal frameworks will be created on data protection and privacy: (1) on the level of the EU, (2) on the level of the Council of Europe and (3) on an international level. On each of these levels the most relevant legal instruments will be analyzed in a similar way, creating a framework which allows testing the different data which are of interest to us.

Each legal framework will therefore consist of the following elements:

1. Scope of application / definitions;
2. Conditions for lawful processing of personal data;
    - Principles relating to data quality;
    - Criteria for legitimate data processing;
    - Rights of the data subject: information – access – object;
    - Duties of the data processor: confidentiality and security of processing – notification duty;
    - Criteria for processing sensitive data;
3. Processing “sensitive data” (prohibited);
4. Justification grounds for processing “sensitive data”.

In the final part of this research, we will check which elements, on the basis of which segmenting is proposed, fall under which level of protection. The key question will be whether the data concerned is “sensitive data” or not. If the data is considered as sensitive, the processing will in principle be prohibited, unless the processing can be justified.

Our research will be based on the study of legislation, legal doctrine and case law.

We must however notice some possible difficulties. At European level, the legislation on data protection is regulated by directive. These legal instruments have to be transposed in national law by each of the EU Member States. As the directive leaves some “freedom” to the Member States in how to implement this directive, the national legislations can differ. For instance, as to the aspect of the “sensitive data”, the Member States can decide to add more elements to the list. They can also decide to take on board more justification grounds for the usage of such data.

Secondly, other international instruments on data protection, which can be but are not necessarily binding, also leave possibilities open for the states to implement the guidelines or legislative framework.

As mentioned, we will not take on board the different national rules and will remain on an international level. In the end the national legislations will have to provide in the minimum protection as mentioned in the European/international binding legislation, as well as protect the fundamental human rights of the individual (such as “the right to privacy”, “right to non-discrimination”).

The following legal sources will be analyzed:

On the level of the European Union

- The Data Protection Directive: Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard

to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011D0061:EN:NOT;

- Directive on privacy and electronic communications: Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L 201, 31.7.2002, p. 37), http://europa.eu/legislation_summaries/information_society/legislative_framework/l24120_en.htm;
- Proposal: General Data Protection Regulation (proposal to replace the Data Protection Directive 95/46/EC), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0011:FIN:EN:PDF;

On the level of the Council of Europe

- Convention for the protection of individuals with regard to automatic processing of personal data, Strasbourg 28/01/1981, http://www.coe.int/t/dghl/standardsetting/DataProtection/default_en.asp;
- Recommendations: http://www.coe.int/t/dghl/standardsetting/dataprotection/legal_instruments_en.asp
    - Recommendation on the protection of personal data for social security purposes, https://wcd.coe.int/ViewDoc.jsp?id=699153&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383;
    - Explanatory Memorandum, http://www.coe.int/t/dghl/standardsetting/dataprotection/EM/EM_R(86)1_EN.pdf;
- Convention proposal for reform: http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD-BUR_2012_01Rev2FIN_en.pdf;

On the international level

- OECD Guidelines for the security of information systems and networks;
- OECD Guidelines on the protection of privacy and trans-border flows of personal data, http://www.oecd.org/document/18/0,3746,en_2649_34223_1815186_1_1_1_1,00.html;
- UN Universal Declaration of Human Rights, art. XII, http://www.un.org/en/documents/udhr/;
- International Covenant on Civil and Political Rights, art. 17,

http://www2.ohchr.org/english/law/ccpr.htm;

- UN Guidelines concerning computerized personal data files, 14 December 1990, http://ec.europa.eu/justice/policies/privacy/instruments/un_en.htm.

3.2 Part 1: General introduction on "right to privacy" and "data protection"

Before elaborating on the subject, we have to state that nowadays the EU Charter of Fundamental Rights defines the right to privacy and the right to data protection as to be two separate rights. However, it is important to mention that the "data protection right" has in fact evolved from the "right to privacy" (article 8 of the European Convention on Human Rights). Although still related to one another, these two rights do not fully overlap each other.

3.2.1 Protection of personal data under article 8 ECHR: the right to privacy

The "right to privacy" as formulated in article 8 of the European Convention of Human Rights (ECHR), adopted by the Council of Europe in 1950 describes the "right to respect for private and family life" as follows:

"*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Art. 8 (1) of the ECHR includes four "sub-rights": the right to respect private life, family life, home and communication. Art. 8 (2) considers the exceptions to the right to privacy; infringements are allowed only when they are legal, necessary and legitimate.

These exceptions must however be restricted (see Case *Klasse* (there is an infringement in the privacy not only when the government invades in the rights of a person, but also when national law foresees such a possible invasion)), furthermore, the European Court of Human Rights (ECtHR) has stipulated that the list of possible exceptions is exhaustive and no other exceptions then those described in art. 8 (2) are accepted (see Case *Golder*).

Over the years the ECtHR has developed case law which has included the protection of personal data under the right to a private life and communication.

As from the start, the ECtHR has interpreted the "right to privacy" in a broad way, and this regarding the concept of "private life", as well as the concept of "correspondence" which is protected under article 8 ECHR. Although the Convention does not entail the more modern means of communication as such, case law of the ECtHR has included telephone conversations, computer and other means of communication under the scope of the ECHR.

In the Malone case, the Court decided that not only the content of the telephone conversations is to be protected, but also the data concerning the conversation (the number called, the incoming number, the date of the conversation,…).

In the Case of *Z. v. Finland*, the Court has stated that the publication of a person's medical records, in the framework of a trial in which that person was not involved as a party, is an infringement of the private life of this person and of that person's family life.

As to the concept of "personal data" with regard to the protection of the privacy, it is clear from the start that not all personal data was protected by the right to privacy since only "privacy sensitive" personal information was brought under the scope of art. 8 ECHR (see Case *Gaskin*, Case *Chave* and Case *Leander*). The Court did not consider the logics of data protection in these cases, given the fact that data protection laws concern and protect all personal data.

In the *Gaskin* Case[1], the Court decided that there was no infringement in the private life when the government denied access to a personal file when the government is not processing the information concerned.

In the *Chave* Case, the Commission did not consider it to be an infringement of the privacy when a file, that contained information on the persons' compulsory placement in a psychiatric hospital, was accessible to other persons than the concerned person himself, since these personal files are designed to safeguard the health and the rights and freedoms of others and were protected by appropriate confidentiality and access rules, being accessible only to a limited category of persons from outside the psychiatric institution.

In the *Leander v. Sweden* Case of 26 March 1987[2], the Court concluded that the Swedish government had the right to consider that the rights of the applicant's individual interests can be overshadowed by the interests of the national security. In this case Mr. Leander protested the use of a secret police file in his recruitment process as a carpenter, a job he was not recruited for on the basis of this report.

[1] ECtHR, *Graham Gaskin v. United Kingdom*, 7 July 1989, case 10454/83, D.A., Vol. 160, par. 41.
[2] ECtHR, *Leander v. Sweden*, 26 March 1989: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57519

It is however also clear that the ECtHR does not follow the logics of data protection laws.

In the Case *Reyntjes v. Belgium*, Mr. Reyntjes complained on the fact that, after a control of his identity card, a registration of that data took place. He claimed this to be an invasion of his privacy. The Commission does not question the fact why and by whom the registered personal data are used, it simply states that there is no infringement since the data on the identity card are not privacy sensitive data. This would not be the case when one looks at this case from a data protection point of view, since in that case all personal data is protected, leading to the conclusion that this registration or processing of data must be investigated, regardless the possible sensitive character of the data..

In the Case *Murray v. the UK*, the Court again does not look at the risks which are involved in the use of at first glance non-privacy-sensitive data.

In the Case *Halford v. the UK*, the Court developed the theory on "the expectation of privacy". A person making a complaint over the telephone was not made aware that the conversation was being monitored. The Court stipulated that therefore, the concerned person could have a "reasonable expectation of privacy" and that the phone call was protected under the right to privacy at that time.

In the Case *P.G. and J.H. v. UK*, it was made clear that also in the public sphere, a person can fall back on the theory on "the expectation of privacy" whereby the Court stipulated that also "public information" on a person can fall under the protection of article 8 ECHR when this information is systematically collected and stored in governmental databanks.

Only since 1997 the ECtHR has taken inspiration from the data protection law (Convention 108) when broadening the scope of the right to privacy to data protection and making some of the data protection principles more clear.

In the Case *Lundvall v. Sweden*, 11 December 1985[3], the ECtHR states that the existence of a system of personal identity numbers as such interferes with neither article 8, nor with any other provision of the Convention. As the protection of personal data is covered by this provision, the use of the system may, however, affect the right to respect for private life.

There is an interference with a person's right for private life where his name appears in a register of defaulting tax debtors to which the public has access and in spite of the fact that a tax appeal is pending. In this case and bearing in mind the applicable local conditions, interference was considered to be necessary for the economic well-being of the country and the protection of the rights and freedoms of others.

[3] ECtHR, *Lundvall v. Sweden*, 11 December 1985, case 10473/83, D.R., Vol. 45, 130.

The Court thus stipulates that the storage of information which is relevant to a person's private life is already falling within the scope of article 8 ECHR. The reasons of further processing of that data are irrelevant.

In the Case *Amann v. Switzerland*, 16 February 2000[4], the ECtHR has taken into consideration the context in which information was obtained and stored; the fact that the information was collected in a filing system was considered to be an infringement of the privacy. The Court considered the storage of the information on the private life of a person by a public authority to be an infringement of the protection of the private life irrespective to whether the information was of a privacy sensitive nature and never actually consulted.

In the Case *Rotaru v. Romania*, 4 May 2000[5], the Court associated again the broad interpretation of the term "private life" in article 8 ECHR with the notion of "personal data" in the data protection regulation.

The court has also emphasized that information which belongs to the public domain can be considered to fall under the scope of article 8 ECHR once it is systematically collected and stored in files held by the authorities (see *Amann* and *Rotaru* cases).

Over the years the ECtHR has expressed the principle that individuals whose personal data have been processed have the right to control the use and registration of their personal data. This "right to control own data" (informational self-determination) includes the right to access the data, to change the data and to ask to delete the data. It was also recognized by the Court that an independent authority should be in charge to make sure that no abuse would occur.

In the case *Leander v. Sweden*, 26 March 1987[6]; the ECtHR stated that a refusal to give access to a personal file falls within the scope of article 8 ECtHR.

In the case *Gaskin v. United Kingdom*, 7th of July 1989[7], Mr. Gaskin was refused access to a file stored by the social services concerning the time he was taken into care during his childhood. The reason for not getting access was that the file contained confidential information. The ECtHR considered this refusal to be a violation of article 8 ECHR, not because of the fact that there was a system of confidentiality which made access impossible, but because the decision whereby the access was denied was not taken by an independent authority.

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[4] ECtHR, *Amann v. Switzerland*, 16 February 2000, case n° 27798/95: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58497
[5] ECtHR, *Rotaru v. Romania*, 4 May 2000, 28341/95: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58586
[6] ECtHR, *Leander v. Sweden*, 26 March 1989: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57519
[7] ECtHR, *Gaskin v. United Kingdom*, 7th of July 1989, case n° 10454/83: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57491

The ECtHR has also acknowledged the fundamental purpose limitation principles meaning that personal data can only be collected, stored and used as far as the goals for which the information is gathered are met.

The Court also acknowledged the right of the individual whose right to privacy was breached, to receive financial redress of the damages.

However, the case law of the ECtHR does not follow the data protection logic whereby all personal data which is processed is affected. The ECtHR always first asks the question whether article 8 ECHR is applicable or not and thus keeps the distinction alive between "privacy sensitive personal data" and "non-privacy sensitive data". Even now the ECtHR still excludes from the scope of article 8 ECHR the processing of data which is as such not considered to be private, data which is not stored systematically and not stored systematically with the focus upon the data subject whereby the data processing could be reasonably expected.

Neither has the ECtHR recognized the very basis of data protection, since it did not accept all the aspects of the underlying data protection principles. An example is that although the Court recognizes that the refusal of access to personal data is in some cases an infringement into the right of private life, at the same time the Court also stated that article 8 ECHR does not entail a right to access personal data. This "right to access" is however one of the fundamental principles of the data protection Convention (and EU Regulation).

The protection of processing personal data, ensured by the article 8 ECHR, is therefore not the same as the protection of processing of personal data under the data protection law, even though article 8 of the ECHR was indeed a first source of protection of personal data. The data protection regulations evolved from the protection under art.8 ECtHR.

3.2.2 Protection of personal data under the data protection rules

Data protection has evolved from the fundamental principle which provides individuals with a "right to privacy". At the same time, data protection and protection of privacy are not interchangeable. Data protection is both wider and more specific than the protection of privacy. Data protection is wider since it considers also other fundamental rights and freedoms of an individual (freedom of speech, freedom of association, non-discrimination). On the other hand, it is more specific since it only deals with the processing of personal data, be it with all personal data. Case law has shown that not all personal data is covered by the right to privacy. [8]

[8] DE HERT P. and GUTWIRTH S., 'Data protection in the case law of Strasbourg and Luxemburg: constitutionalisation in action' in S. GUTWIRTH, Y. POLLET, P. DE HERT, C. DE TERWANGNE en S. NOUWT (eds.), *Reinventing Data Protection?*, Dordrecht, Springer, 2009, p. 5 and following.

Over the years it became clear however that the interpretation of article 8 of the ECHR had reached its limits, especially in the light of new technologies which emerged.

Several legal instruments have been set up. In general, a data protection mechanism is a set of rules and principles on how to process data lawfully in order to ensure that both the rights of the individual are protected and on the other side that there is a free flow of data possible. This mechanism includes rules on the data that is collected and on the processing of that data, the rights of the data subjects and the duties of the data processors and/or providers. Each mechanism also provides in a special protection of "special categories of data" or "sensitive data".

The first instrument concerning data protection in Europe was developed in 1981 when the Council of Europe adopted the Convention on Data Protection (ETS No. 108). The Convention dealt with data protection as a protection of the fundamental rights of the individual (data subject), particularly regarding the "right to privacy" and the processing of data. The content of the Convention was inspired by previous court cases of the ECtHR since many of the principles concerning the lawful processing of data, included in the Convention were developed by the ECtHR.

Following the Convention on Data Protection of the Council of Europe, new instruments were also developed on a European level by the European Community (now European Union). The main legal instrument is the EC Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (EU Data Protection Directive). Other instruments on the EU level were the Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector which was replaced by Directive 2002/58/EC on privacy and electronic communications of 12 July 2002 and Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Also, all EU legal instruments concerning data protection dispose that the rules on data protection are set up to ensure an adequate level of protection of the fundamental rights and freedoms of the individual, especially the right to privacy, as well as to ensure the free flow of data. In the light of this project our main focus will go to the EU Data Protection Directive.

As far as the case-law is concerned with regard to the EU Data Protection Directive, it is clear that several of the cases of the Court of Justice have been interpreted in the light of article 8 of the ECHR (right to privacy). The Court of Justice decided that processing of data can infringe the right to privacy. For this reason the Court will have to check whether processing of data, when it infringes that privacy of a person, is legitimate; thus whether it is legal, necessary and proportionate and legitimate. In the case *Österreichischer Rundfunk* (20 May 2003), the Court even stated that any infringement to the data processing directive also entails an infringement of the right to privacy. In

many other cases the court referred to the 3 elements which allow for an infringement under article 8 ECHR.

In 1980, the Organization for Economic Co-operation and Development (OECD) developed Guidelines on the protection of privacy and trans-border flows of personal data on the international level. These were developed "*because of concerns about the inconsistent or competing national data protection laws that had arisen in response to new and automated means of processing information" and "emphasized that the OECD countries have a common interest in protecting privacy and individual liberties*"[9].

Within the United Nations, the Universal Declaration of Human Rights includes "the right to privacy" in article 12 of the UDHR. Article 17 of the International Covenant on Civil and Political Rights has included the right of privacy. In 1990, the UN has also developed Guidelines concerning computerized personal data files.

3.2.3 The right to data protection: a fundamental right

In the EU Charter of Fundamental Rights of the European Union (2000), a separate "right to data protection" is recognized for the first time, and this independent from the "right to privacy".

This idea was recommended by the WG 29, by stating that the basis for "data protection" is not only the "right to privacy", but can also be a "right to freedom" or a "right to human dignity". When processing certain data, such as political or religious conviction of an individual, one does not deal with the personal life of a person, but with other fundamental rights and freedoms that are to be taken into consideration (freedom of speech e.g.).

The necessity of having more transparency when it comes to the processing of personal data, especially when it concerns information processed by the public sector, is linked to the notion of "public administration".

The principle of "good governance" implies that public administration cannot abuse its information power for other objectives than the ones for which they were set up. At the same time the damage done by the infringement of the individuals' rights must way up against the benefits of the processing.[10]

Article 7 of this Charter is a reproduction of the article 8 of the ECHR, while article 8 of the Charter introduces the right to protection of data:

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[9] 'The evolving privacy landscape: 30 years after the OECD Privacy Guidelines', a document of the Working Party on Information Security and Privacy, Dir. For Science, Technology and Industry, Committee for Information, Computer and Communication Policy, DSTI/ICCP/REG(2010)6/FINAL (Unclassified), 6 April 2011.

[10] DE HERT, P., *Handboek Privacy*, December 2003, Brussel, Uitgeverij Politeia nv. , 86 p.

"*1. Everyone has the right to the protection of personal data concerning him or her.*

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right to access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority."

Although not binding at the time it was agreed upon, the Charter has now "the same legal value as the Treaties" according to Article 6.1 of the Treaty on the European Union. This means that the Charter is legally binding for EU institutions and bodies, as well as for the Member States with regard to the implementation of the EU law.

3.3 Part 2: Legal Framework

In this section, we will analyze the different legal sources for data protection on 3 levels: European Union, Council of Europe and the international level.

On each level we describe the legal instruments in the following way:

(1) Scope of application / definitions
(2) Conditions for lawful processing of personal data

- Principles relating to data quality
- Criteria for legitimate data processing
- Rights of the data subject: information – access – object
- Duties of the data processor: confidentiality and security of processing – notification duty
- Criteria for processing sensitive data

(3) Processing "sensitive data" (prohibited)
(4) Justification grounds for processing "sensitive data"

3.3.1 Legal framework on the level of the European Union (EU)

3.3.1.1 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

On European level the most important legal instrument is the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of

such data.[11] This directive aims to protect the fundamental freedoms of individuals and in particular their "right to privacy", while on the other hand proclaiming the free flow of personal data between the Member States.

The instrument chosen by the European Parliament and Council is a directive which implies that the incorporated rules have no direct effect. Member States are obliged to implement the Directive 95/46 in their national legislation. They are of course free to make their national legislation more stringent, but have to respect the "minimum standards" with regard to data protection as set forward in the Directive.

When implementing this Directive 95/46, the Member States must protect the fundamental rights and freedoms of natural persons and in particular their right to privacy. Member States must also make sure not to restrict, nor prohibit the free flow of personal data between Member States for reasons of protection of these fundamental rights and freedoms. This means that data protection does not have "a prohibitive nature", but that it is rather a set of rules aiming at the free flow of information, whereby some safeguards are introduced to make sure the rights of the individual, such as his right to privacy, are protected.

3.3.1.1.1 Scope of application (art. 3 and 4) / definitions (art. 2)

The EU Directive is applicable to the processing of personal data, both by automatic means or otherwise processed, and personal data which are part of a filing system or are intended to be part of such a system (art. 3.1.).

Article 2a stipulates that "personal data" shall mean for the purpose of the Directive 95/46 "any information relating to an identified or identifiable natural person ("data subject"). A person is identifiable when one can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity".

The same article 2b states that "processing of personal data' or 'processing" shall mean "any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as the collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction".

In order to fall under the scope of the Directive 95/46 the processed personal data must be part or intended to be part of "a filling system". This "personal data filling system" or "filling system" shall mean "any structured set of personal data which are accessible

[11] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011D0061:EN:NOT

according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis" (art. 2c).

Article 3.2 gives some exceptions to the scope of application of the Directive 95/46.

However, the Directive does not apply to data processing done in the scope of an activity which falls outside the scope of Community law, such as those provided for by Titles V and Title VI of the Treaty of the European Union[12], and neither to processing operations concerning public security, defense, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.

Neither will the Directive 95/46 apply to data processing which is carried out by a natural person in the course of a purely personal or household activity (art. 3.2.).

According to the case law of the European Court of Justice[13] these exceptions and the non-application of the Directive 95/46 must be interpreted in a strict manner. In other words, the principles incorporated in the Directive should play their role as much as possible when processing of personal data is concerned.

Article 4 of the Directive 95/46 concerns the territorial scope. When established in one Member State, the data controller must apply the national law implementing the current Directive 95/46 of the country where he is established. When the data controller is established in more than one Member State, he must make sure that he complies with the national rules applicable in each of these Member States.

Also, when the data controller is established outside the EU but uses equipment located in a Member State for the purpose of processing, he will have to apply the national legislation of that Member State.

For the purpose of the Directive a "data controller" is considered "the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designed by national or Community law".

Court cases:

- *Österreichischer Rundfunk, ECJ, 20 May 2003, joined cases C-465/00, C-138/01 and C139/01; question was posed whether the Directive was applicable when the*

[12] Now Title V of the Treaty on the European Union, General Provisions on the Union's external action and specific provisions on the common foreign and security policy.
[13] See *infra*: cases of *Österreichischer Rundfunk* and *Lindqvist*.

case concerned the processing of data by a public authority in the framework of its public mission – according to the Austrian government this was not the case since the control activity of the national authority did not fall within the Community law – The court decided that the Directive was indeed applicable and confirmed that the non-application of the Directive should be an exception.[14]

- *Lindqvist Case, ECJ, 6 November 2003, Case C-101/01, (Lindqvist), European Court Reports, 2003, p. I-12971; the non-applicability of the Directive when data on the health of a person is published on a website. In this case the Court also stated that "the act of referring on an Internet page to personal information concerning an identifiable person' is considered to be personal data processing by automatic means within the meaning of the Directive".*[15]
  Furthermore, it was decided that charitable or religious activities are not covered by the exception mention in art. 3(2). When a website is made by a natural person and is accessible to an indefinite number of persons, than the website is not considered to be an exception falling under art. 3 (activities carried out by individuals in the course of their personal life).

- *Tietosuojavaltuutettu Case, ECJ, 16 December 2008, Case C-73/07; an activity in which data on earned and unearned income and the assets of natural persons are collected from documents in the public domain held by tax authorities and processed for publication involves processing of data in the meaning of art. 3.*

3.3.1.1.2 Conditions for lawful processing of personal data: the principles of processing

The core principles of the processing of data according to the Directive 95/46 (and of many other data processing laws) are the fair and lawful processing, the principle of minimality, the purpose specification principle, the information quality principle, data subject participation and control, disclosure limitation, information security and the principle of sensitivity.

The first principle of data processing is the principle of "fair and lawfully processing", which can be found in art. 6.1a Directive 95/46: "Member States must insure that data is processed fairly and lawfully".

[14] P. DE HERT and S. GUTWIRTH, 'Data protection in the Case Law of Strasbourg and Luxembourg: constitutionalisation in action' in S. GUTWIRTH, Y. POLLET, P. DE HERT, C. DE TERWANGNE en S. NOUWT (eds.), *Reinventing Data Protection?*, Dordrecht, Springer, 2009, p. 29-30; Court of Justice, case C-101/01, Lindqvist, 6 November 2003.
[15] P. DE HERT and S. GUTWIRTH, 'Data protection in the Case Law of Strasbourg and Luxembourg: constitutionalisation in action' in S. GUTWIRTH, Y. POLLET, P. DE HERT, C. DE TERWANGNE en S. NOUWT (eds.), *Reinventing Data Protection?*, Dordrecht, Springer, 2009, p. 29-30.

Whether data is processed lawfully or not is clear, but the notion of "fairness" is not. Generally, it is accepted that the "fairness" aspect means that in striving to achieve their data-processing goals, the reasonable expectations and interests of the data subjects must be taken into consideration. When collecting and processing personal data one cannot unreasonably intrude in the data subjects' privacy nor interfere in an unreasonable manner with their autonomy and integrity. The first principle therefore implies that a certain balance must be respected or, in other words, that the data processing should occur in a way that can be considered to be "proportional".

"Fairness" also means that the data subject cannot be forced to give data on himself or to accept that data on him is being processed. Data controllers cannot misuse the information they might have. This requirement is also noticeable in the provision on the "consent" which sometimes must be given by the data subject in order to collect or process data on him. This consent must be given "freely".

"Fairness" further implies that the processing of data should occur in a manner that is transparent towards the data processing subjects. Data subjects must be aware of which data is being collected and processed and why this is being done.

The data processor must, to a certain extent, take into account the expectations of the data subject. This has an impact on the purposes for which the information is being processed.

The second "principle of minimality" means that the data processors should limit the amount of personal data to the data which is necessary to achieve the purpose for which the data is being collected. Article 6.1c of the Directive 95/46 states that personal data must be "relevant and not excessive in relation to the purposes for which they are collected and further processed".

Minimality must therefore be ensured at the stage of the collection of the data, but also later on in the data processing period one has to make sure that personal data will be erased or anonymized once the data is no longer required for the purposes for which it is kept. Furthermore, also the fact that data processing is prohibited unless it is necessary to achieve a specified purpose, as mentioned in articles 7 and 8 of the Directive 95/46, is an expression of the "principle of minimality".

The third principle on which data processing is based is the "purpose specification principle". Art. 6.1b makes clear that "personal data shall be collected for specified, lawful and/or legitimate purposes and not subsequently processed in ways that are incompatible with those purposes".

The national data protection legislation will of course determine what can be considered to be a "legitimate purpose" or not. In general however, and interpreted under the

criterion of acceptability, personal data should only be processed for purposes that do not run counter to predominant social mores.

Once personal data is collected lawfully and for legitimate objectives, the further processing of this data for historical, statistical or scientific purposes, should not be considered as incompatible with the purposes for which the data have originally been collected, provided that suitable safeguards have been provided by the Member States (see art. 6.1b Directive 95/46).

The fourth core principle which is also included in art. 6 of the Directive 95/46 is "the principle of information quality". Personal data must be valid with respect to what they are intended to describe, and relevant and complete with respect to the purposes for which they are intended to be processed.

The need to valid information/data is taken up in art. 6.1d of the Directive 95/46 "the data must be accurate and, where necessary, kept up to date"; whereas the need for relevant and complete data is expressed in art. 6.1c of the same directive "data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed".

According to the Directive 95/46 the data controller must make sure that the "data quality principle" is met by "taking every reasonable step".

It is the data controller's task to make sure that the above mentioned requirements are met (art. 6.2 of the Directive 95/46).

The principle concerning data subject participation and control has developed from the idea that individuals, whose data is being collected and processed, should be able to participate in this process or at least have some influence on it.

This principle entails several sub-rules namely: (a) rules requiring data controllers to collect the information from the data subject himself; (b) rules demanding the data subjects' consent before collecting or processing the data and (c) rules requiring the communication to the data subject on the processing operations.

3.3.1.1.2.1 Rules requiring data controllers to collect the information from the data subject himself

The Directive 95/46 contains no rule stating that the data controller needs to collect the information exclusively from the data subject.

3.3.1.1.2.2 Rules demanding for the data subjects' consent before collecting or processing the data

Art. 7a of the Directive 95/46 does state that Member States may process data legitimately when the data subject has given his consent.

According to article 2 of the Directive 95/46 the "data subject's consent" means "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed".

The Article 29 Working Party has indicated that "consent" must satisfy four criteria in order to be legally valid: (1) the "consent" must be a clear and unambiguous indication of the wishes of the data subject; (2) the "consent" must be given freely; (3) "consent" must be specified and (4) "consent" must be informed.[16]

The Directive thus sets high standards to the requirement of the "consent". If not all information has been given to the data subject in order to make an informed decision, the consent can be seen as "not existing" by the court or the Supervisory Authority.

As to the administrative side, the management is very time-consuming and difficult. Records of the consent must be kept and individuals always have the opportunity to revoke their consent in a later stage. In practice, data protection authorities are therefore not keen on the use of consent on a large scale, particularly in situations where the individual might be susceptible to pressure.[17]

When it comes to the act of consenting and the administration of this act, one must make sure that it is taken seriously and one must be vigilant that the giving of one's consent is not "routinized". Simply adding a box "sign here and here" or "just tick the box" is not enough. Neither will the act of "giving notice to the data subject that the data will be processed at the absence of objection of that data subject" be sufficient as to say that one has given his consent. One should set standards on how "a consent" should be articulated and these standards should be stringently applied.[18]

The consent of the data subjects does play an important role in the data protection law. It is a justification to process data which one otherwise could not process. The requirement for the consent of the data subject does not however entail the "sovereign right to veto any act concerning their personal data". When a data subject is not

[16] Article 29 Working Party, 'Working document on a common interpretation of Article 26(1) of Directive 95/45.
[17] C. KUNER, *European Data Protection Law. Corporate Compliance and Regulation*, second edition, Oxford University Press, 2007, p. 243, (5.28)
[18] R. BROWNSWORD, 'Consent in Data Protection Law: privacy, fair processing and confidentiality', in *Reinventing Data Protection?*, S. GUTWIRTH, Y. POULLET, P. DE HERT, C. DE TERWANGNE, S. NOUWT (eds.), Dordrecht, Springer, 2009, p. 89-90.

agreeing with the provisions of a law, he does not have the right to refuse to give his consent in order to process his data.[19]

The consent must also be "specified" or specific, which means that it should be specific to the processing purpose; it does not mean that the data controller cannot ask to consent to broad purposes or that it necessarily can only be given for shorter periods of time.[20]

Unlike under art. 8 Directive 95/46 concerning the "processing of sensitive data", the consent does not necessarily need to be "explicit", which means that the subject does not have to make an affirmative act in order to give his consent.

However, also without the consent of the data subject, legitimate processing is possible. Directive 95/46 includes, in art. 7b-f, other criteria according to which the data processing can be legitimized.

Member States can furthermore legitimately process data when:

ii. The processing of the personal data is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

Certain types of contract require data processing. An example is when one orders a book via a website. In that case he will have to give certain data in order to make the sale and delivery possible.

Here one could also think about the data processing in the framework of job search or agreement in this respect.

iii. The processing of personal data is necessary for compliance with a legal obligation to which the controller is subject; or

iv. The processing of personal data is necessary in order to protect the vital interests of the data subject;

This provision is strictly foreseen in cases in which an individual is subject to danger to life and limb, e.g. in case of car accidents or other situations where a person's life is at stake.

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[19] R. BROWNSWORD, 'Consent in Data Protection Law: privacy, fair processing and confidentiality', in *Reinventing Data Protection?*, S. GUTWIRTH, Y. POULLET, P. DE HERT, C. DE TERWANGNE, S. NOUWT (eds.), Dordrecht, Springer, 2009, p. 85.

[20] R. JAY, *Data protection law and practice*, Third Edition, Andover, Thomson Sweet & Maxwell, 2007.

v. The processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed;

This provision will be of great importance for our research since it concerns the data processing which the data controller is obliged to do in the public interest or that might be needed to be carried out by the governmental authority.

A disadvantage of this legal basis is that data subjects whose data are processed under it have the right to object to its use.

Case law:

- *Court of Justice, C-524/06, Heinz Huber v. Germany, 18 December 2008; "the concept of necessity laid down in art. 7 (e) of Directive 95/46 has an independent meaning in Community law and must be interpreted in a manner which fully reflects the objective of the Directive 95/46". In the Huber case the Court looked at the question whether a database can be set up which "processes data for the purpose of the application of the legislation relating to the right of residence and for statistical purposes" and which contains certain personal data relating to Union citizens who are not German nationals and which may be consulted by a number of public and private bodies. Do "these purposes" fall under the concept of necessity laid down in the Directive 95/46? Can the same conclusion be made in the light of non-discrimination (article 12 EC)?*

- *Court of Justice, C-92/09 and C-93/09, Schecke GbR and Eifert, 9 November 2010; the question posed was whether the retention of certain data (storage of the IP addresses of the users of a homepage without the express consent of the data subjects) relating to the users of the internet sites is lawful under art. 7 (e) of the Directive.*

vi. Processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which requires protection under article 1 (1)[21].

This is the "balancing of interests" or "legitimate interest" test: processing must be legitimate. But there is more: processing of data cannot be done when the fundamental rights and freedoms are infringed.[22] Here case-by-case decisions will have to be taken.

[21] Article 1 (1) Directive 95/45 "In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons with respect to processing of personal data".
[22] C. KUNER, *European Data Protection Law. Corporate Compliance and Regulation*, second edition, Oxford University Press, 2007, p. 243, (5.28).

Case law:

- *Court of Justice, joined cases C-468/10 en C-469/10, 24 November 2011, ASNEF and FECEMD; the Court stipulates that article 7 (f) of the Directive 95/46 has "direct effect" and must be interpreted in the way that national laws which "in absence of the data subject's consent, and in order to allow such processing of that data subject's personal data as is necessary for the purposes of the legitimate interests of the data controller or of the third party or parties to whom those data are disclosed, requires that the fundamental rights and freedoms of the data subject be respected and that the data should appear in public sources" are an infringement of the art. 7 (f) as the national law excludes unjustly, in a categorical and generalized way, any processing of data nor appearing in such sources.*

- *Court of Justice, C-524/06, Heinz Huber v. Germany, 18 December 2008; "the concept of necessity, laid down in art. 7 (e) of Directive 95/46, has an independent meaning in Community law and must be interpreted in a manner which fully reflects the objective of the Directive 95/46". In the Huber case, the Court looked at the question whether a database can be set up which "processes data for the purpose of the application of the legislation relating to the right of residence and for statistical purposes" and which contains certain personal data relating to Union citizens who are not German nationals and which may be consulted by a number of public and private bodies. Do "these purposes" fall under the concept of necessity laid down in the Directive 95/46? Can the same conclusion be made in the light of non-discrimination (article 12 EC)?*

3.3.1.1.2.3 Rules requiring the communication to the data subject on the processing operations

Directive 95/46 (articles 10 – 15) has several rules which give the data subject some rights to intervene in the data process and to be informed on what is processed on him. There are rules on (a) data processors' duty to inform, (b) data subjects' right of access, (c) data subjects' right to object.

3.3.1.1.2.4 Data processors' duty to inform

More or less unique in the international data protection laws is the requirement that data controllers have the obligation to inform the data subject on the processing of the information up-front. The obligations of the data processor are different according to whether or not the data was collected from the data subject itself.

When personal data is collected from the data subject himself “Member States must provide that the controller or his representative must provide a data subject with at least the following information, unless he already has it: (a) the identity of the controller and of his representative, if any; (b) the purpose of the processing for which the data are intended; (c) any further information such as: - the recipients or categories of recipients of the data; - whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply; - the existence of the right of access to add the right to rectify the data concerning him in so far such information is necessary, having regard to specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject” (art. 10 Directive 95/46).

In case the information is not collected from the data subject himself, art. 11.1 of the Directive 95/45 disposes that “Member States shall provide that the controller or his representative must, at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged no later than the time when the data are disclosed provide the data subject, with at least the following information, except when he already has it: (a) the identity of the controller and of his representative, if any; (b) the purpose of the processing for which the data are intended; (c) any further information such as: - the categories of data concerned, - the recipients or categories of recipients, - the existence of the right of access to and the right to rectify the data concerning him in so far such information is necessary, having regard to specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject”.

Art. 11.2 of the Directive 95/46 provides that art. 11.1 is not applicable when the processing concerns processing for statistical purposes or for the purposes of historical or scientific research. The provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law. In these cases Member States shall provide appropriate safeguards.

3.3.1.1.2.5 Data subjects’ right of access

The right to access is laid down in art. 12 of the Directive 95/46. Every data subject has the right to access the data on him as well as information concerning the purposes of the processing, the categories of data concerned and the recipients or categories of recipients to whom the data is disclosed. The data subject can ask for a rectification, erasure or blocking of data being processed in a way which is not in compliance with the Directive as well as for a notification to the third party of any rectification, erasure or blocking carried out.

Case law:

vii. *Court of Justice, C-553/07, M.E.E. Rijkeboer, 7 May 2009; “It is up to the Member States to foresee the right to access to the data subject; the Member States have to fix the time-limit during which the information is stored and how*

long the right to access can be carried through; this must be done in a way that there is a balance between on the one hand, the interest of the data subject in protecting his right to privacy and on the other hand the burden which this obligation to store the information entails for the data controller."

3.3.1.1.2.6 Data subjects' right to object

The data subject has the right to object to data processing in general (art. 14a Directive 95/46); he has the right to object direct marketing (art. 14b Directive 95/46) and he has the right to object to decisions based on fully automated assessments of one's personal character (art. 15 Directive 95/46).

The information confidentiality and security principle can be found in art. 16 and 17 of the Directive 95/46.

The Directive foresees that data controllers must implement security measures for ensuring that personal data are protected against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against unlawful forms of processing (art. 17.1 Directive 95/46).

These measures must be taken having regard to the state of the art and the cost of their implementation and must ensure a level of protection which is appropriate to the risks represented by the processing and the nature of the data to be protected (art. 17.2 Directive 95/46).

A controller must also by way of contract or other legal act (art. 17.3 Directive 95/46), ensure that data processors engaged by him provide for "sufficient guarantees in respect of the technical security measures and organizational security measures governing the processing to be carried out".

These measures must also be documented (art. 17.4 Directive 95/46).

For sake of completeness, we refer to the articles 18-21 of Directive 95/46 regarding the data processor's notification duty.

3.3.1.1.3 Processing of special categories of data – "principle of sensitivity" (art. 8, 1)

When dealing with information of a "sensitive nature" the data protection Directive 95/46 foresees a more stringent protection. In principle, the processing of such data is prohibited, unless one meets the conditions of the justification grounds mentioned in the Directive 95/46.

The Directive 95/46 states that Member States must prohibit the processing of personal data concerning racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning the health or sex life.

The elements mentioned are the minimum norm. Member States can of course add other elements which they consider to be “sensitive personal data”, which they do not want to be processed as such.

E.g. Finland considers the social welfare needs of a person or the benefits, support or other social welfare assistance received by the person as “sensitive data”. Also information on disability is considered sensitive information in Finland.

3.3.1.1.4 Justification grounds for processing “sensitive data” (art. 8, 2-7)

3.3.1.1.4.1 General

The processing of “special categories of data” is allowed in exceptional cases mentioned in the Directive 95/46.

This is indeed the case when:

i. The data subject has given his explicit consent to do so, unless the national laws stipulate differently; or

ii. The processing of such data is necessary in relation to the national employment law; or

iii. The processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or

iv. The processing of data is necessary to facilitate the freedom of association; or

v. The processing of data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defense of legal claims.

Art. 8, 4 mentions that Member States may, when suitable safeguards are foreseen, lay down exemptions in addition to the ones mentioned in par. 2 and this for reasons of substantial public interest. In the preamble of the Directive 95/46 it is mentioned that social protection and health might be such areas where exemptions can be made, especially when the processing of sensitive data is ensuring the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system.

When making an exemption, the Member States must insure that there are suitable and specific safeguards so as to protect the fundamental rights and the privacy of individuals.

In fact, recital 2 of the EU Directive 95/46 considers that “data-processing systems are designed to serve man; they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy”. This means that the processing of sensitive data must also be considered in the light of the fundamental freedoms as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as in the light of the EU Charter.

Also, the EU Supervisor has expressed its point of view that one has to make sure that the rules of the Directive 95/46 must be interpreted in the light of these fundamental rights. Therefore, the case law of the ECtHR also has an impact when data processing is considered. As mentioned in the previous parts of this chapter on data protection and privacy, the ECtHR interprets notion of “private life” in a very broad way (see 3.2.1).

Ensuring quality and cost-effectiveness of the procedures in social protection can be used as a possible exemption in order to make use of “sensitive data”. This could be a possibility to do so without having to have the explicit consent of the data subject.

When dealing with social security and right servicing one often will need to process sensitive data.

Furthermore, art. 8.7. states that Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed. Regarding this matter and specifically in relation to Belgium, we can mention the existence of a social security identification number, i.e. the unique identification key for each person. and the database that contains this information: the Crossroads Bank of Social Security.

3.3.1.1.4.2 Explicit consent

Also in this matter, the “data subjects' consent” is to be understood as “a freely given specific and informed indication of wishes by which he signifies his agreement to personal data relating to him being processed”.

For the processing of sensitive data the consent must be “explicit”. This means that the data subject must be aware of the details of the processing.

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Member States have different approaches as to what "explicit consent" entails (e.g. in Italy sensitive data can only be processed with a written consent and prior authorization of the Garante; German law gives more details on the consent)[23].

They also have the possibility to provide in their national legislation that data processing of sensitive personal data can be done without the "explicit consent".

In point 33 of the Preamble of the Directive 95/46 it is however mentioned that "whereas data which are capable by their nature of infringing fundamental freedoms or privacy should not be processed unless the data subject gives his explicit consent".

3.3.1.1.4.3 Vital interest of the data subject

A second possible exception to the prohibition of processing of sensitive data under the Directive 95/46 is the "processing in the vital interest of the data subject". An example that has been accepted in practice as being "in the vital interest of the data subject" is the blood test taken from a victim of a road accident.

An exception to the prohibition of processing special categories of data is also foreseen in the field of public health. The prohibition does not apply when processing of data is required for the purposes of preventive medicine, medical diagnosis, the provision of care and treatment or the management of health care services, and where those data are processed by a health professional subject (under national law) who is bound by the obligation of professional secrecy or by another person also subject to such obligation to secrecy.

Case law:

According to case law of the Court of Justice the "data concerning health" must be interpreted widely, it concerns both physical and mental aspects of the health of the individual (see Case C-101/01, *Bodil Lindqvist*, 2003 ECR I-12971; reference made to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes indeed personal data concerning health).[24]

Furthermore, Member States are allowed to foresee further exceptions for reasons of substantial public interest. They can do so either by national law or by decision of the supervisory authority. When Member States make such provisions, this should be notified to the Commission.

[23] CAMMILLERI-SUBRENAT A. and LEVALLOIS-BARTH C., *Sensitive Data Protection in the European Union*, Travaux du CERIC, Brussel, Bruylant, 2007, p. 63-64.
[24] CAMMILLERI-SUBRENAT A. and LEVALLOIS-BARTH C., *Sensitive Data Protection in the European Union*, Travaux du CERIC, Brussel, Bruylant, 2007, p. 69.

In the Preamble of the Directive 95/46 (see point 34) reference in this respect is made to public health and social protection, especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health care insurance, scientific research and government statistics.

Again, one has to be aware of the possible different implementations of the concept “public health” and “social protection”. Most countries have a more restrictive approach when it concerns public health and a more wide approach when it concerns “public interests”.

It is up to the Member States to determine under which conditions a national identification number or any other identifier of general application may be processed.

3.3.1.1.4.4 Justification ground in the light of the RightServicing approach

In this section we will look at the RightServicing concept from a data protection's point of view. We will therefore briefly highlight the meaning of different aspects of the RightServicing approach and their (possible) relevance in respect to data protection regulations.

“Segmenting” as one of the characteristics of RightServicing means that one is making groups of persons according to their needs and wants. When this division is done on the basis of the social programs that exist and are administered e.g. unemployed persons, people with disabilities, etc., the distinction is clear.

However, one can imagine that elements as gender, age, language, ethnicity can also play an important role in setting up services or reforming existing services in order to make them more effective. These factors can serve to make further groups of distinction, but they often fall under the scope of what is considered to be “sensitive data” and can thus only processed under stringent rules as we have discussed above.

For instance, data that are considered to be sensitive are:

- ethnicity: indigenous, migrants (ethnic origin);
- processing of data on health;
- processing of data on sex life.

Regarding this topic it must be noted that certain data can be processed in the framework of a profiling operation (see 4). In that case, the rules on data protection will have to be respected.

Other data can be considered to be personal data, but not “sensitive” data, and will therefore not be subject to the same strict conditions on processing...

"Fast-tracking" is a technique where one tries to make sure that those persons who are entitled to receive a benefit, will be recognized on short term and will be able to receive this benefit relatively quickly. The approach may be different from person to person, e.g. somebody who is looking for a job and has a bad track-record in the past when it comes to looking for a job should be followed more intensively than the person who has a good record.

The fast-tracking aspect will therefore also imply the processing of personal data. In this respect we refer to applying a consent model with an opt-in or opt-out system as described by Serge Gutwirth.[25]

"Addressing complexity" is looking at those persons who have a multitude of problems and trying to attend to them in a more integrated way in order to deal with the complexity of their problems.

Viewed from a data processing aspect, one has to see in how far there might be limits as to the sharing of data available in different organizations. In this aspect we refer to the Gitwirth's multi agency approach.[26]

"Risk Management" needs prevention and mitigation, requiring organizational measures. This also requires data processing for a specific purpose which might be used as such or in the profiling aspect.

"Accessing" looks at how people access and consume social security. Those who can and want would be able to manage their social security affairs themselves.

People must be informed on their rights: some will be more disadvantaged and will not be in the position of self-management necessitating a differential approach on the matter.

Also, the data processing questions will be more important now that the use of electronic means becomes more important. Moreover, it is not entirely clear what rules should apply to social services that can be accessed and consumed via electronic means.

"Automating": using technology to make reduce the manual processing of data.

"Predicting": trying to prevent social risks from occurring through data analysis.

[25] DE HERT P. and GUTWIRTH S., 'Data protection in the case law of Strasbourg and Luxemburg: constitutionalisation in action' in S. GUTWIRTH, Y. POLLET, P. DE HERT, C. DE TERWANGNE en S. NOUWT (eds.), in *Reinventing Data Protection?*, Dordrecht, Springer, 2009, p. 18 and following.
[26] DE HERT P. and GUTWIRTH S., 'Data protection in the case law of Strasbourg and Luxemburg: constitutionalisation in action' in S. GUTWIRTH, Y. POLLET, P. DE HERT, C. DE TERWANGNE en S. NOUWT (eds.), in *Reinventing Data Protection?*, Dordrecht, Springer, 2009, p. 20 and following.

There is no doubt that this aspect will require data being processed. However, it is not clear what data will actually be analyzed, where these data will come from and whether or not the data subjects have given their consent to possible data processing for the purpose it is being processed for.

"Micro programs" designing the programs for the individuals in order to:

- achieve the desired outcome and/or;
- address a complex problem.

"Leveraging the ecosystem" implies the collaboration and sharing of information and expertise with other organizations and stakeholders in order to give the individual a more effective and efficient service.

In respect to this element of RightServicing it will be of great importance to determine which information shall be shared and in what way this will occur. It goes without saying that this will be especially important to prevent and resolve possible accountability and liability problems. A possible solution that can be found, is trying to obtain the consent of the data subject on this matter. Then again is should be noted that different national regulations might prove to create some difficulties.[27]

3.3.1.2 Directive on privacy and electronic communications: Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)[28]

While the Directive 95/46 applies to non-public communications services, the Directive on privacy and electronic communications on the data processing applies in the electronic communications sector. According to article 3 of the Privacy Directive, the Directive applies to "publicly-available electronic communication services in public telecommunication networks in the Community". These communication services include telecommunication, faxes, e-mail, the internet and other similar services.

A new instrument on data protection, currently being proposed on the European Union level, is the Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data[29].

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[27] DE HERT P. and GUTWIRTH S., 'Data protection in the case law of Strasbourg and Luxemburg: constitutionalisation in action' in S. GUTWIRTH, Y. POLLET, P. DE HERT, C. DE TERWANGNE en S. NOUWT (eds.), in *Reinventing Data Protection?*, Dordrecht, Springer, 2009, p. 20 and following.

[28] http://europa.eu/legislation_summaries/information_society/legislative_framework/l24120_en.htm

[29] Proposal for a Regulation of the EP and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, COM (2012) 11 final,

In order to make sure that data protection is becoming more "harmonized" in the different Member States, the option was taken to propose a Regulation instead of a Directive. This legal instrument has direct working and will be applicable as such in the different Member States without the need for an implementation by those Member States.

As there is still only the proposal for such a Regulation, we will address the changes proposed only briefly.

i. A first aspect that is clarified, is the concept of "personal data". On the one hand the proposal for a General Data Protection Regulation repeats the wording of the Directive that "personal data is any information relating to the data subject"; on the other hand it contains more specific information in this respect. For instance, the new proposal mentions location data and internet-related data (IP addresses or cookies' identifiers). That means that there is no need for an apparent link between the data and the identifiable person in order to speak of "personal data".

ii. The new Regulation maintains the difference in processing common personal data and sensitive personal data. However, new elements of sensitive data have been added: definitions of "genetic data", "biometric data" and "data concerning health" have been included.

iii. The Fair Information Principles are still the basis of the data protection model, but a new principles have been added:

Processing must be:

- Done lawfully, fairly and in a transparent manner in relation to the data subject;
- Collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- Adequate, relevant, and limited to the minimum necessary in relation to the purposes for which they are processed; they shall only be processed if, and as long as, the purpose could not be fulfilled by processing information that does not involve personal data;
- Accurate and kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;
- Kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data is processed; personal data may be stored for longer periods insofar as the data will be processed solely for historical, statistical or scientific research purposes in accordance with the

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Brussels, 25.01.2012,
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0011:FIN:EN:PDF.

rules and conditions of Article 83 and if a periodic review is carried out to assess the necessity to continue the storage;

- Processed under the responsibility and liability of the controller, who shall ensure and demonstrate for each processing operation the compliance with the provisions of this Regulation;

iv. The "individual consent" is expressed clearer and more straightforward. Article 7 of the proposal for a General Data Protection regulation includes several "the conditions for consent":

"1. The controller shall bear the burden of proof for the data subject's consent to processing of their personal data for specified purposes.
2. If the data subject's consent is to be given in the context of a written declaration which also concerns another matter, the requirement to give consent must be presented distinguishable in its appearance from this other matter.
3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal.
4. Consent shall not provide a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller."

3.3.2 Legal framework on the level of the Council of Europe

3.3.2.1 Convention n° 108 for the protection of individuals with regard to automatic processing of personal data, Strasbourg, 28 January 1981

3.3.2.1.1 Scope of application (art. 3) / definitions (art. 2)

According to the Convention n° 108, the notion of "personal data" refers to any information which can be related to an identified or identifiable person (data subject).

The aim of the data protection convention is clear: "to secure in the territory of each of the Parties for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him".

Contrary to the EU Directive we discussed in the section above, the Convention n° 108 of the Council of Europe only applies to automated personal data files and automatic processing of such data in the public and private sector.

However, states may give notice by declaration that they exclude certain automated data (processing) from the application of this Convention or can extend the application of the

Convention to other organizations as well as to personal data that is not processed automatically.

The territorial scope of Convention n° 108 also is larger than the territorial scope of the EU Directive, since 48 countries have ratified this Convention.

3.3.2.1.2 Conditions for lawful processing of personal data

- Principles relating to data quality (art. 5)

According to the Convention the principles relating to data quality include that:

i. Data must be obtained and processed fairly and lawfully;

ii. Data must be stored for specified and legitimate purposes and not in a way which is incompatible with these purposes;

In the Explanatory Report of the Convention n° 108 it is mentioned that the reference to "purposes" means that data should not be stored for unclear reasons or purposes. Defining which purposes are legitimate can vary according to national legislation (see point 41 of the Explanatory Report).

iii. Data must be adequate, relevant and not excessive in relation to the purposes for which they are stored;

iv. Data must be accurate and, where necessary, kept up to date;

v. Data must be preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

In the Explanatory Report it is made clear that the limitation of storing data linked to the data subject does not mean that it is not allowed to keep the data linked to the data subject; it is important that the data can be linked readily (see point 42 of the Exploratory Report).

- Criteria for legitimate data processing

See data quality principles.

- Rights of the data subject (art. 8)

The Convention establishes some "additional safeguards for the data subjects", as there are:

i. The data subject must be able to know about the existence of an automated personal data file, about its purposes, as well as the identity and residence of the data controller;

ii. The data subject must be able to obtain information whether or not personal data relating to him is being stored in a data file system. He must be able to get this information without excessive delay or expense;

iii. The data subject must be able to ask rectification or erasure of such data if the processing of such data was not conform with the national law giving effect to the basic principles on the "quality of data" and the "special categories of data" set out in the Convention;

iv. The data subject must have a remedy if his request for confirmation or rectification is not been met.

- Data security

Specific security measures must be taken for every file.

- Duties of the data processor:

In this respect, it should be mentioned that the data processor has a notification duty.

3.3.2.1.3 Processing of special categories of data – "sensitive data" (art. 6)

According to the Convention n° 108, personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life may not be processed automatically unless national law provides for appropriate safeguards.

According to the Explanatory Report, the categories of data mentioned in this article are considered to be sensitive data in all the Member States. There remain of course national differences, as Member States can provide for additional data that are to be considered as being "sensitive data". The degree of sensitivity of the categories of data also depends on the legal and sociological context of the different countries.

The report also mentions that the meaning of the term "personal data concerning health care" includes "information concerning the past, present and future, physical or mental health of an individual. The information may refer to a person who is sick, healthy or deceased. This category of data also covers those relating to abuse of alcohol or taking drugs".

Personal data, as defined under the “special categories of data” in art. 6 of the Convention n° 108, is protected as such in all the Member States. However, the States still have the possibility of adding more data elements which they feel that need this special protection. Furthermore, Member States may even have different interpretations on the specifically mentioned categories of personal data. These national differences need to be taken into consideration when considering right servicing and the collection and processing of data. The processing of this kind of data can be justified, but the necessary protection that the processor has to take into consideration is more stringent.

When processing personal data, which is considered to be “sensitive data”, one also has to take into consideration the fact that this kind of data is also closely linked with the fundamental rights and freedoms of the individual. Processing data on race or ethnicity or even sexual life may create problems as to the principle of non-discrimination, while other data relating to the health of the person relates to the principle of human dignity.

3.3.2.1.4 Justification grounds for processing “sensitive data” (art. 6 & art. 9)

As mentioned above, there is a prohibition to process certain categories of data unless the national law foresees the necessary safeguards. However, art. 9 of the Convention n° 108 allows for exceptions to the prohibition of processing sensitive data within the following limits:

“*Derogation is possible when provided by national law and when it constitutes a necessary measure in a democratic society in the interests of: (a) protecting state security, public safety, the monetary interests of the state or the suppression of criminal offences or (b) protecting the data subject or the right and freedoms of others*.”

The report on the application of the Convention n° 108 gives more explanation on the grounds of justification for processing sensitive data. The report states that “the exceptions to the basic principles of data protection are limited to those which are necessary for the protection of fundamental values of a democratic society”. The exceptions listed in art. 9 (2) are very specific in order to avoid too much leeway for the States to introduce more exceptions.

When the processing of sensitive data is allowed, this processing must of course also fulfill the other conditions mentioned in the data protection Convention (see above).

Within the Council of Europe, several recommendations were published which allow the processing of sensitive data according to the nature of the information and the purpose for which the information will be processed (e.g. collecting and processing of genetic data in order to predict illnesses may be considered a valid exception to the prohibition of processing sensitive data as it is in the public interest).

In many of these recommendations, the processing of sensitive data is allowed when the data subject gives his consent.

3.3.2.2 Additional Protocol to the Convention for the Protection of individuals with regard to automatic processing of personal data regarding supervisory authorities and trans-border data flows (ETS No. 181)

The additional protocol was issued to address the increasing amount of trans-border data processing and data transfers.

The protocol obliges the States to provide for an independent authority which ensures the compliance with the measures in its domestic law.

Member states must only provide in the possibility of trans-border transfer of data to a country which is not a party to the Convention n° 108 if “an adequate level of protection for the intended data transfer” is ensured.

A Member state's legislation can allow a transfer of personal data, regardless of the adequate level of protection, for reasons which are in the specific interest of the data subject or when there are legitimate prevailing interests (public interests). For example, when safeguards are foreseen in a contract by the data controller transferring the data and those are checked and found adequate by the independent supervisory authority, trans-border transfer of data is allowed.

The articles of this protocol are considered to be a part of the Convention n° 108.

3.3.2.3 Council of Europe recommendations (not binding)

3.3.2.3.1 Recommendation No. R (86) 1 on the protection of personal data used for social security purposes

This Recommendation was the result of the work of a working party composed of experts from all over Europe and presided by Mr. Peter Hustinx. They met on several occasions to reflect upon the problems created by the use of personal data in the field of social security and to examine whether it would be appropriate to draw up a legal instrument concerning the protection of data in this specific field.

The Working Party decided to only consider social security and exclude social welfare. However, later on the Working party did consider the importance of the relationship which could be established between both sectors, especially with respect to the transmission of data.

The main questions which were considered were the following:

i. the categories of information needed for social security purposes;
ii. the ways in which this information was collected;
iii. the sources from which it came;
iv. the purposes for which it was used;
v. the period for which it was stored;
vi. the guarantees as to confidentiality of information;
vii. the question of communication towards third parties.

On the basis of the discussion within the Working Party, the Committee of Ministers of the Council of Europe adopted a set of guidelines for the national legislators. Recommendation no. R. (86) 1 on the protection of personal data used for social security purposes was adopted on the 23rd of January 1986.

It is acknowledged that the "use of personal data is indispensable to the effective administration of the social security system" and that "a balance must be found between the need for the use of information in the social security sector on the one hand and on the other hand the necessary protection of the individual, especially when automatic processing is involved".

The following guidelines have been included:

° Use of personal data processed automatically for social security purposes both in public and private sector.

° Definition "social security purposes": all tasks which social security institutions perform in regard to the following categories of benefits: sickness and maternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of occupational injuries and diseases, death grants, unemployment benefits and family benefits.

Member states may extend the scope even further to contributory and non-contributory benefits as well as to manually processed data.

° During the processing (collection, storage, use, transfer and conservation) respect to privacy must be insured.

° Collection and storage is only allowed when the data is necessary for the completion of the task of the social security institution (principle of proportionality). What sort of data is "necessary to enable social security institutions concerned to accomplish their task" will, according to the Explanatory Memorandum, have to be a weighing of the interests, a process to which all the interested parties must contribute.

The Memorandum goes on by stating that when social security institutions discover that they have collected personal data which is neither relevant nor necessary, they must erase this data.

° Collection and storage of personal "sensitive data" (racial origin, political opinions or religious or other beliefs) is not permitted unless absolutely necessary for the administration of a particular benefit.

Here the remark must be made that, according to the social security system of a certain country, the type of data which is considered to be sensitive data can be different from state to state. Therefore, there will be differences between the different states when it comes to the limitations on the processing of sensitive data (see Explanatory Memorandum).

° Collection should be done from the data subject himself, unless national law provides otherwise. When it concerns the collection of sensitive data via other sources, the data subject should be informed and he should express his consent or other safeguards should be introduced before the data can be processed.

Each social security institution should be required to publish a list indicating which data they collect and store, the categories of persons who are covered by the data, the purposes for which they require those data, the authorities to which they communicate the data on a regular basis, as well as the categories of data they communicate.

° Use of data:

A social security institution is allowed to also use the data obtained for a certain task for other purposes which fall within their competence.

Exchange between institutions is allowed in the framework of their tasks. It is permissible for a social security institution to forward the information it has collected in the framework of its tasks to another social security institution, but only when this is necessary for the completion of its tasks (e.g. the administration of the benefit). In this respect, the list of information that has to be published by the social security administration is even more important.

No communication outside the social security institutions is authorized (e.g. tax administrations), unless with the informed consent of the data subject or under the conditions otherwise foreseen by law. This additional safeguard is needed since the information is now being used for a different purpose than initially planned.

° Data which is anonymous is not subject to the limitations mentioned.

°A social security number or similar means of identification (identification cards serving a similar purpose as social security numbers) can be introduced only when accompanied by the necessary safeguards provided for by the national law (e.g. the Belgian Crossroads Bank for Social Security uses such a number for the collection of data and the transfer of these data to different institutions).

The safeguards must prevent that the information which is connected to the social security identification number or card could be used by other non-social security institutions for other purposes than those for which the information was collected. As far as the identification cards are concerned, the information should be readable and not excessive, taking into account the purpose for which it is to be used (see Explanatory Memorandum).

°Access to the data: the right of the data subject to obtain and rectify data cannot be restricted unless in very specified circumstances.

The Explanatory Memorandum stipulates that social security institutions could facilitate these rights by making reference to the possibility of access and/or rectification on the application form or via other means of communication.

° Data security: social security institutions must incorporate the necessary technical and organizational measures in order to safeguard the security and confidentiality of personal data used for social security purposes.

It is the responsibility of the social security institutions to make sure that these measures are taken and put into practice.

° Storage of data must be limited to the time needed to accomplish the task for which it is collected and stored.

The general principle is that information stored “in a form which permits identification of the data subject is permitted not longer than is required for the purpose for which those data are stored”. According to the Explanatory Memorandum, this principle should be adapted when it concerns the social security sector and this because of the “special nature and variety of benefits in issue”. Therefore, the Recommendation stipulates that the conservation of the data cannot be longer, unless it “is justified by the accomplishment of the tasks concerning a particular benefit or by the interests of the data subject”. The time should thus also cover the period of payment and supervision and that of conservation bound up with the time taken by litigation, including appeal proceedings.

The Explanatory Memorandum also stipulates that the conservation rule is only relevant for the purpose of a particular benefit, but also, where appropriate, for the purposes of subsequent benefits connected therewith.

The storage periods must be laid down in respect to each category of benefits (see recommendation 9.2). The length is different according to the nature of the benefit (e.g. data concerning sickness benefits will not be kept as long as information concerning old-age benefits) (see Explanatory Memorandum).

When data is essential for the working out of entitlements to various types of benefits, storage is allowed for as long as it is necessary to complete the assessments of all these benefit entitlements.

The Explanatory Memorandum states that “data of a sensitive nature” should not be stored for longer than what is absolutely necessary. Storage of sensitive data is furthermore also only possible when it is allowed by law.

When information collected and stored by social security administrations is needed for historical, research or statistical purposes, it can be transferred to non-social security institutions if the data subject has given his informed consent or when the law foresees the necessary safeguards to protect the individual’s rights.

Personal data which is rendered anonymous can be stored and used outside research purposes and is not subject to any limitation.

When information is used which remains identifiable and is used for statistical or research purposes, the Recommendation No. R (83) 10 on the protection of personal data used for scientific research and statistics applies.

° Trans-border flows of personal data between social security institutions must be permitted to the extent that it is necessary for the application of international legal social security instruments.

If necessary, additional safeguards must be provided for in order to make sure that the right to privacy of the data subject is also protected in the country where the information is forwarded to.

In the light of the increased mobility of workers, and thus social security, the recommendation foresees some rules concerning the trans-border flows of personal data used for social security purposes. In the Explanatory Memorandum it is made clear that many of the international legal instruments (such as bilateral and multilateral agreements) were set up before the introduction of the Convention N° 108 on the protection of personal data. Therefore, they have no consideration for the right to privacy of the data subject when it concerns the trans-border processing of the information.

The principle of proportionality is introduced (information can be transferred as long as it is necessary for the application of the legal instrument), as well as the principle of finality

(information can only be used/processed for the purpose for which it has been transferred).

In case no data protection rules apply in the country where the information is transferred to, agreements on the matter might have to be set up. According the Explanatory Memorandum, such agreements do not necessarily need to be formal treaties, but can simply be letters which are exchanged.

3.3.2.3.2 Recommendation No. R (97) 5 on the protection of medical data

(replacing Recommendation No. R (81) 1 on regulations for automated medical data banks)

Processing of medical data is not only taking place in a doctor-patient relationship, but also by other institutions that may hold information on the health status of a person (e.g. school director, insurance companies, social security institutions). Sometimes, medical data is even collected and stored without the explicit consent of the data subject.

The processing of certain medical data outside the doctor-patients' relationship may harm the individual and unauthorized disclosure of such data and can lead to discrimination or the violation of other fundamental rights. It is also important that, when medical data is processed, one makes sure that it is done in an accurate and confidential manner.

The needs of processing medical data are contradictory: on the one hand, authorities must be able to consult the information when needed, and on the other hand, others may not have access to the data. While the rights on a persons' privacy must be respected, the same person also has the right to health and should be able to benefit from the evolutions and progress of medical science.

A working party was set up to address these issues and to set up a set of guidelines for the member states, in order to deal with "data processing problems with regard to medical data including genetic data and data relating to contagious and incurable diseases".

Special attention was given to the notion of appropriate safeguards concerning information of the data subject, to the informed and express consent of the data subject, as well as to medical research.

After deliberations and consultations, the Recommendation No. R (97) 5 on the protection of medical data was adopted by the Committee of Ministers on the 13th of February 1997.

The following guidelines were foreseen:

Definitions

° As to the definition of "personal data", this is more or less the same definition as the one used in the Convention 108, namely "personal data covers any information relating to an identified or identifiable individual. A person is identifiable as long as identification is possible within a reasonable amount of time and manpower. When the person is not identifiable, the data is considered to be anonymous".

° "Medical data" refers to "all personal data concerning the health of an individual. It also refers to data which have a clear and close link with health as well as to genetic data".

The Explanatory Memorandum states that it is understood that medical data is a broad concept which equally applies to the past, present and future health of the data subject and to both physical and mental health.

It was furthermore understood that data which has a "clear and close link to health" is included. This means that medical data also "includes any information giving a ready idea of an individual's medical situation, for instance for insurance purposes such as personal behavior, sexual lifestyle, general lifestyle, drug abuse, abuse of alcohol and nicotine, and consumption of drugs".

These guidelines should be applied when medical data is processed together with other data, for example by social security institutions. In that case, one should also take into consideration the guidelines which have been set up for the processing of data for social security purposes.

Next to medical data, also genetic data have been included in the scope of the Recommendation No. R (97) 5.

° "Genetic data" refers to "all data whatever the type, concerning the hereditary characteristics of an individual or concerning the pattern of inheritance of such characteristics within a related group of individuals. It also refers to all data on the carrying of any genetic information in an individual or genetic line relating to any aspect of health or disease, whether present as identifiable characteristics or not".

Genetic data can be collected and stored for different purposes: prevention, diagnosis, treatment, genetic counseling and risk evaluation as well as for research purposes. Genetic data does often not only have implications for the data subject alone, but also for all his blood relatives (present and future).

° The scope of the Recommendation: applicable to the collection and automatic processing of medical data, unless domestic law, in a specific context outside health-care, provides other appropriate safeguards (Medical data is indeed not only processed

by health professionals, but will also be processed by other administrations or institutions such as the social security administration, insurers, etc.).

The Convention n° 108 provides (art. 6) that personal data concerning health may not be processed automatically unless national law provides for the necessary safeguards. This means that when processing of medical data is not covered by this recommendation, the member states have the obligation to make sure that the necessary protection is given.

The recommendation applies both to the public and private sector. Like the Convention n° 108, it only concerns automated processing, but member states can decide to also foresee coverage of non-automated processing.

In the Explanatory Memorandum it is made clear that the recommendation is not only intended to cover medical data, as being processed by health care professionals, but rather that it should apply to any person or body which routinely or occasionally processes medical data by automated means, whether or not for a legitimate reason. Thus, the principles are also applicable when medical data is processed by an employer, or by a school, etc.

° Respect for privacy and respect for the fundamental rights must be guaranteed during the collection and processing of the data (this means storage, modification, conservation, extraction, diffusion,…) – in principle medical data can only be collected by health care professionals – if the controller is not a health care professional, the same quality of confidentiality will be necessary.

° Collection and processing of medical data must be fairly, lawfully and only for specified purposes.

Fair collection means that medical data must be obtained from the data subject himself. Only if it is necessary for the purpose of processing or if the data subject is not in the position to give the data, data can be collected from other sources. In that case, one must respect the principles concerning the collection and processing, the consent and communication as set forward in the recommendation.

Purposes for which medical data can be processed (provided for by law) are public health reasons, another important public interest or if permitted by law: for preventive medical purposes (or diagnostic or for the therapeutic purposes) with regard to the data subject or a relative in the genetic line, or to safeguard the vital interests of the data subject or of a third person. Also, when the data subject or his legal representative or an authority or any person or body provided for by law, has given his consent for one or more purposes, data processing of medical data is allowed.

National law must provide for the collection of the named purposes, otherwise processing is not allowed. When a law provides for the collection but without stipulating

the necessary safeguards, the law must undergo the test of art. 9 of the Convention n° 108. The collection must thus "constitute a necessary measure in a democratic society in the interest of protecting state security, public safety, the monetary interests of the state or the suppression of criminal offences, or of protecting the data subject or the rights and freedoms of others". The Explanatory Memorandum goes on by stating that, when a law foresees a collection of medical data, it is assumed that this law is in the public interest.

When the law foresees the collection of medical data for the purpose of the public health, this collection can be done without the consent of the data subject. If other public interests are at stake the national law can foresee additional purposes for which the consent of the person is not needed in order to collect medical data.

When the data subject is not in a position to give his consent, data may be collected (if provided for by law) when necessary to safeguard the vital interests of the person or those of another person. The "vital interest of a person" includes the preservation of the physical or mental integrity of either the data subject or somebody else including, in the case of genetic data, a member of the data subject's genetic line. Medical data can thus be collected without the consent of the data subject when it concerns data for preventive medical purposes or for diagnostic or therapeutic purposes.

Once medical data have been processed for preventive medical purposes, it may also be processed for the management of a medical service operating in the interest of the patient, but only when the management is provided for by the health-care professional who collected the data. This is for example the case when a person has rights to some social security benefits because of his illness. The information gathered during the treatment period by the health professional can be used by the social security administration.

° Unborn children: Medical information of unborn children is protected in a way comparable to the protection of a minor. The parents will have the authority to consent in the processing of this data.

° Genetic data collected for preventive treatment, diagnosis or treatment or for scientific research, can only be used for those purposes or to allow the data subject to take an informative decision.

The collection and processing of genetic data in order to predict illness may be allowed in cases of overriding interest and subject to appropriate safeguards defined by the law.

Genetic data can only be collected for health protection purposes, to prevent any serious harm to the data subject. The explanatory memorandum explains that one cannot e.g. ask from a candidate for a contract (insurance, work) to undergo a genetic analysis, by making the employment or insurance dependent on the outcome of such a test unless

the analysis is necessary for the protection of the individual (e.g. when he has to work with specific substances).

° Data subject rights: The recommendation furthermore foresees a right to information (principle 5) as well as the right to access and rectify the information (principle 8) collected on the data subject and stipulates the requirement of "consent". Finally some conditions are mentioned on the basis of which the medical data can or cannot be communicated.

Information is self-evident when the medical data processing is only allowed when the data subject gives his "informed consent". However, also in the situations whereby no consent is necessary, the data subject has the right to information. There are only some exceptions whereby this right can be limited: for certain cases of public interest, in cases where the data subject or third persons must be protected or in medical emergencies.

Furthermore, one has to inform the data subject at the earliest at the time of the collection of the data or as soon as possible if the data is not collected from the data subject. Information given should concern the relevant issues listed in principle 5 of the Recommendation.

The information should be appropriate to the data subject and adapted to the circumstances. Information should preferably be given individually.

In principle 5.6 some possible restrictions are named with regard to the information duty. Information may be limited for the same reasons where no consent is needed.

° Consent: When the consent of the data subject is required, it must be given "freely, expressly and informed". The consent does not have to be written. The consent can be obtained in a coded form (for instance a plural-functional card e.g. the Belgian SIS-card).

The consent must be informed which means that the data subject has the right to be informed on the elements in principle 5.

Furthermore, the consent must be given "freely", which implies that the data subject must be able to withdraw or modify the terms and conditions of his consent. The drafters of the recommendation expressed in the explanatory memorandum that the fact that the data subject can withdraw his consent may create several practical problems and therefore did not include a provision on the withdrawal of consent. They refer to the example whereby the national law makes social security benefits dependent on the processing of medical data, if in this case the data subject should withdraw his consent, he no longer has any right to the named benefits.

° Communication: Medical data is sensitive data and can therefore not be communicated outside the medical context, unless the data is made anonymous (and is therefore no longer regarded as personal data).

In certain situations, data must however be communicated outside the health sector (e.g. to social security administration). In that case the communication must be done according to the guidelines under principle 7.

° Security (principle 9) and Conservation (principle 10): Additional safeguards are foreseen as to the security, as well as to the conservation of the collected data.

The security measures to be taken are technical and organizational measures protecting the data against accidental or illegal destruction, accidental loss as well as against unauthorized access, alteration, communication or any other form of processing.

They must give an appropriate level of protection and must be reviewed periodically.

Principle 9.2 provides for a number of measures which have to be taken, in particular in order to ensure the confidentiality, integrity and accuracy of processed data as well as the protection of patients.

One of these measures is that, “with a view to, on the one hand, selective access to data and, on the other hand, the security of the medical data, the data processors/controllers must ensure that the processing as a general rule is so designed as to enable the separation of: - identifiers and data relating to the identity of persons; - administrative data; - medical data; - social data; - genetic data”.

The conservation of medical data is regulated in principle 10 of the Recommendation. Taking into account the situation that medical data must be treated differently than other types of data files, it is stipulated that medical files should not be stored longer than necessary. Cumulating medical data on a person is a treat to his privacy.

On the other hand, long-term conservation of medical files is sometimes needed in the view of public health or medical science. Principle 10 foresees a possibility of long-term storage when the necessary safety and privacy safeguards are given.

When data is made anonymous, it can be stored for a longer period without being a threat to the privacy of the data subject. If this is not possible, other special safety measures must be taken.

Despite the special safety measures taken, the data subject still has the right to ask to erase the medical data which has been stored on him. He does not have this right when the data is made anonymous or when there are overriding and legitimate interests (e.g.

public health or medical science) not to do so or if there is an obligation to keep the data on record.

There are no provisions foreseen for the transfer of medical data to another health-care professional when the data subject asks for the transfer.

° Trans-border data flows:

In order to protect the data subjects' privacy, the Recommendation foresees a number of safeguards when it comes to the transferring of data to another country.

When it concerns a member state that is also party to the Data Protection Convention n° 108 and that has a legislation which foresees an adequate protection of the processing of medical data or when it concerns a state which did not ratify the Convention, but which does have an adequate data protection legislation including the medical data, there is no restriction as to the transfer of medical data.

When the legislation in the country where the information is destined for does not include an adequate medical data protection, transference of medical data should only occur when:

i. The necessary measures are taken in order to obtain the level of protection laid down in the Convention n° 108 and in the recommendation; or
ii. When the data subject has given his consent.

Unless the data subject has given his informed consent or unless in the case of an emergency, the following measures must be taken:

i. The person responsible for the transfer must indicate to the addressee the specific and legitimate purposes for which the data was originally collected, as well as the persons or bodies to whom they may be communicated;
ii. The addressee should, unless provided otherwise, undertake, in respect of the person responsible for the transfer, to honour these purposes and not to communicate the information to other persons and bodies then those indicated.

° Scientific research: When using medical data for research, the data must be made anonymous. Techniques in order to make the information anonymous must be promoted.

However, principle 12.2 foresees the conditions which have to be met when a research project is to be carried out for legitimate purposes and cannot be carried out when the information is made anonymous.

3.3.2.3.3 Recommendation CM/Rec (2010) 13 on the protection of individuals with regard to automatic processing of personal data in the context of profiling

This Recommendation can be of interest in the framework of the right-servicing approach since many of the characteristics of right-servicing fall back on profiling techniques (also see chapter 4 on profiling).

New ICT-tools allow for public and private institutions to collect a vast amount of information and personal data. This collected data can be processed by calculation, comparison and statistical correlation software with the aim of producing profiles that could be used in many ways for different purposes. The technique of profiling allows institutions to address specific groups with specific services they provide.

At the same time, the profiling technique is a threat to the right to privacy and other fundamental rights of the concerned persons. There is a lack of transparency and sometimes the person profiled is not even aware that it is happening.

Profiling may also lead to a violation of the principle of non-discrimination as it can lead to the situation where some persons are deprived of certain services.

Special precautions must therefore be foreseen, even if the profiling is legitimate, because otherwise there is a risk of damaging the human dignity as well as other fundamental rights and freedoms, including economic and social rights. In this respect all the stakeholders contribute to a fair and lawful profiling of individuals.

The Recommendation has set forward the following guidelines:

° Definitions:

The Recommendation takes over the definitions of “personal data” and “processing” from the Convention n° 108; at the same time it considers the elements which belong to the “special categories of data” to be “sensitive data”.

“A profile” refers to a set of data characterizing a category of individuals that is intended to be applied to an individual.

“Profiling” means an automated data processing technique that consists of applying “a profile” to an individual, particularly in order to take decisions concerning him or her or for analyzing or predicting his or her personal preferences, behaviors and attitudes.

° General principles:

During the collection and processing phase, with the purpose of profiling, the data processor must make sure that the right to privacy and the principle of non-discrimination is respected.

Measures should be taken to use as much privacy enhancing techniques as possible, while at the same time one has to make sure that techniques undermining such privacy enhancing techniques must be taken care of.

° Conditions for the collection and processing of personal data:

The Recommendation sets forward some guidelines as to the lawfulness, the data quality and the use of sensitive data.

The collection and processing must be fair, lawful and proportionate and can only be performed for specified and legitimate purposes.

The personal data must be adequate, relevant and not excessive in relation to the purpose for which it is collected.

Storage in an identifiable format is only allowed for as long as it is necessary for the purposes for which it is collected and processed.

Collection and processing for profiling purposes is only allowed when:

i. It is provided for by law, or

ii. If it is permitted by law and

- The data subject or representative has given his free, specified and informed consent;
- Profiling is necessary for the performance of a contract to which the data subject is a party;
- Profiling is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the data controller or in a third party;
- Profiling is necessary for the purpose of the legitimate interests of the data controller (or third party) unless where the interests are overridden by the fundamental rights and freedoms of the data subject;
- Where profiling is in the vital interests of the data subject.

When the data subject is not in the position of giving his free, specific and informed consent, profiling should be forbidden. Exceptions are allowed when it is in the legitimate

interest of the data subject or when there is an overriding public interest. In that case the necessary safeguards must be provided for.

Informed consent implies that the data controller must prove that the data subject is informed according to the guidelines set forward in principle 4.

In order to ensure that the consent is given freely, specifically and informed, the information service provider must ensure that the data subject has non-profiled access to information about their services. Only when the service required needs knowledge on the data subject's identity, profiling is possible.

The distribution and use without the data subject's knowledge, of software aimed at the observation and monitoring of the use of a given electronic communication network in the context of profiling should be permitted only if expressly mentioned in the law and when accompanied by the necessary safeguards.

As to the quality of the data, the data processors must correct any inaccuracies and must, within a reasonable time, reevaluate the quality of the data and statistical inferences used.

Collection and processing of sensitive data for profiling is prohibited, except if these data are necessary for lawful and specific processing purposes. The national legislation must provide for adequate safeguards. If consent is required, this consent must be explicit.

The data subject must be fully informed when he is approached by the data controller in order to collect personal data in the framework of profiling.

The information which has to be communicated can be found under principle 4 of the Recommendation.

The information includes: an indication that the collected data will be used for profiling; the purposes of this profiling; the categories of personal data used; the identity of the data controller and the existing safeguards. In order to make sure that the profiling is done fairly, information must also be given with regard to: the categories of persons or bodies to whom or to which personal data may be communicated as well as the purposes; the possibility to refuse or withdraw the given consent as well as the consequences of doing so; -when and how one can exercise his right of access, objection or correction or his right to bring a complaint before the authorities; an indication from where the data will be collected; whether response to the questions for the collection of the data are compulsory or not and what possible consequences are if one does not answer; the duration of the storage and the envisaged effects of the attribution of the profile to the data subject.

When the information is collected directly from the data subject, the data controller can inform him directly. When this is not the case, the data controller must inform the data subject as soon as he has collected the data. If the data controller is intending to transfer the personal data to a third party he must inform the data subject at the moment of the first transference.

In the case where personal data is collected for other purposes than profiling, but where it would be processed in the context of profiling later on, the data controller is also obliged to inform the data subject in the same manner as described.

There is no obligation to inform the data subject, when he has already been informed, when it proves to be impossible to do so or when it would take a disproportionate amount of effort to do so and when the collection of data with the purpose to profile is foreseen by law.

The data subject has the following rights:

i. The data subject has the right to be informed at his request, within a reasonable time and in an understandable form concerning: his personal data, the logics behind the profiling and whether the data will be communicated to third parties as well as the purposes for which profiling will be used.

ii. Data subjects should be entitled to correction, deletion or blocking of their personal data when the profiling is not done according to the national legislation or the principles set forward in this Recommendation.

iii. The data subject must have the right to object to the use of personal data for profiling on compelling legal grounds. When the national legislation however foresees the collection of personal data with the aim of profiling, there is no right to objection.

    When the profiling is done with the aim to use the processed data for direct marketing, the data subject does not need to give any justification for his objection to use the personal data.

iv. Restrictions to “the right to object” which can be made if necessary in the democratic society for reasons of state security, public safety, the monetary interests of the state or protection of data or the rights and freedoms of the data subject, should be communicated to the data subject in writing mentioning the legal and factual reasons for such a restriction.

v. In case a person is subject to a decision, having legal effects concerning himself, that is taken on the sole basis of profiling, the person must be able to object the decision. This is not the case if the procedure is provided for by law or when the

decision was taken in the course of the performance of a contract or for the implementation of pre-contractual measures taken at the request of the data subject.

Finally, the Recommendation foresees principles on remedies (national legislation should provide for sanctions and remedies), data security (appropriate technical and organizational measures must be taken against accidental and unlawful destruction of data or accidental loss, as well as against unauthorized access, alteration, communication or any form of unlawfully processing of personal data) and supervisory authorities (need for independent authorities to supervise the working of the data protection laws and principles, in case of profiling a notification system may be put in place whereby the data controllers must notify the supervisory authority which can check beforehand whether the conditions are met).

3.3.2.3.4 Other Recommendations prepared by the Council of Europe are:

i. Recommendation No. R (2002) 9 on the protection of personal data collected and processed for insurance purposes
ii. Recommendation No. R (99) 5 for the protection of privacy on the Internet
iii. Recommendation No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes
iv. Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies
v. Guiding principles for the protection of personal data with regard to smart cards (2004)

3.3.3 Legal framework on the broader international level

3.3.3.1 Organization for Economic Co-operation and Development

3.3.3.1.1 Recommendation of the OECD Council on "Guidelines for the Security of Information Systems and Networks: Towards a Culture of Security" adopted on 25th of July 2002.

These guidelines aim "to promote a culture of security when using the information systems and networks", "to raise awareness about the risk of information systems and networks", "to foster greater confidence", "create a general frame of reference", "promote co-operation and information sharing" and "promote the consideration of security as an important objective".

These aims should be consistent with the values of a democratic society, particularly the need for an open and free flow of information and basic concerns for personal privacy. The OECD has developed furthermore complementary recommendations concerning

guidelines on other issues which are important in the information society such as privacy issues[30].

The nine principles set forward in this Recommendation are:

1. Awareness;
2. Responsibility;
3. Response;
4. Ethics;
5. Democracy;
6. Risk assessment;
7. Security design and implementation;
8. Security management;
9. Reassessment.

3.3.3.1.2 Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (OECD Privacy Guidelines) (1980)

These Guidelines were developed because of concerns about the consequences of inconsistent or competing national data protection laws that had arisen in response to new and automated means of processing information. They also emphasize the common interest in protecting privacy and individual liberties.[31]

The OECD Guidelines are developed in response to the differences between the national privacy legislations and aimed at introducing some basic principles for national application as well as for international application in order to reduce the possible hindrance of privacy law to the free flow of data. They are not legally binding.

The principles for national application are:

1. The collection limitation principle

The collection of information must be limited and be obtained lawfully and fairly and, where appropriate with the knowledge and/or consent of the data subject.

2. The data quality principle

Data collected should be relevant, necessary, accurate, complete and kept up-to-date for the purpose for which the data will be used.

[30] 1980 OECD Guidelines Governing the protection of Privacy and Transborder Flows of Personal Information.
[31] The evolving privacy landscape: 30 years after the OECD privacy guidelines, DSTI/ICCP/REG(2010)6/Final, 6 April 2011.

3. Purpose specification principle

The purposes of the data processing must be known as from the moment that the data is collected. The processing must be limited to the fulfillment of those purposes.

4. Use limitation principle

Data may not be disclosed, made available or otherwise used for purposes other than those specified in accordance with the “purpose specification principle” except (1) when the consent of the data subject is given or (2) when it is included in the law.

5. Security safeguards principle

Reasonable security safeguards must be put into place against risks of loss, unauthorized access, destruction, use, modification or disclosure of data.

6. Openness principle

There should be a certain amount of transparency about the developments, practices and policies with respect to personal data.

7. Individual participation principle

The data subject should have the right (a) to be informed whether data relating to him has been stored; (b) information on the content of that data; (c) to challenge the decision when he is refused to be informed as mentioned under a and b; (d) to challenge the data which has been collected relating to him and have that data erased, rectified, completed or amended.

8. Accountability principle

It is the data controller who is to make sure that the principles mentioned are complied with.

3.3.3.2 United Nations

Within the United Nations, the right to privacy is mentioned in article 17 of the International Covenant on Civil and Political Rights.[32]

Article 17 stipulates:
"*1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

[32] http://www2.ohchr.org/english/law/ccpr.htm

2. Everyone has the right to the protection of the law against such interference or attacks."

With regard to data protection the UN General Assembly of the United Nations adopted some guidelines for the Regulation of Computerized Personal Data Files (Resolution 45/95) on the 14th of December 1990.[33]

These Guidelines are non-binding and call for national regulation in this field. They are neither legally binding to natural persons, legal entities or countries. The Guidelines relate to data processing activities using digital processing methods.

The protection of personal digital data by the United Nations conforms to the standards set by various international instruments. The UN Guidelines, the OECD Guidelines of 1980, and the EU Directive 95/46/EC of 24 October 1995, all point out four principles that should be followed when collecting and handling personal data: the purpose-specification requirement, the principle of accuracy, consent requirements, and the requirement of availability of data to individuals.

First of all, the purpose-specification principle states that there must be a legitimate purpose for data collection, and that the use of the data collected must be compatible with the specified purpose.

Secondly, data controllers have the responsibility of ensuring that data is kept up-to-date and accurate. The individual usually has a right to object if the information is inaccurate.

Thirdly, whenever possible, consent of the individual should be obtained before data is collected. International standards recognize that in many cases it is not feasible for consent to be obtained, for example during sensitive investigations. In such cases, investigations and data collection can proceed without the consent of the data subject.

Fourthly, every individual should have the right to ascertain whether personal data is stored, who has access to this information, and for what purposes it is used.

Other applicable principles set out in the UN guidelines, are lawfulness and fairness in the collection and use of ICT data as well as the principle of non-discrimination. Finally, data must be secured against both natural dangers and from accidental loss or destruction.[34]

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[33] http://ec.europa.eu/justice/policies/privacy/instruments/un_en.htm

[34] M. VICIEN-MILBURN, the United Nations and personal data protection, Jusletter 3, Oktober 2005 http://www.a-datum.ru/downloads/conferences/27th/The%20united%20nations%20and%20personal%20data%20protection.pdf

4 Profiling by police and border control

4.1 Introduction

Although it might not seem that obvious, there are quite some similarities to be found between the RightServicing approach and the concept of profiling by police and border control agents.

Given its relevance in respect to the RightServicing concept, we will in this chapter briefly discuss the matter of profiling and highlight those aspects that are useful in our legal analysis of RightServicing.

For sake of completeness, we also refer to section 3.3.2.3.3, as discussed in the previous chapter on data protection and privacy.

4.2 Profiling under UK law

Since the very beginning, law enforcement authorities have been looking for persons breaching the law, using all kinds of external indications that these persons may be guilty of an offence. In a way, any police officer, customs' or border control agent will constantly evaluate indications to further control or examine one person rather than another. Experience and even intuition may most often guide them in doing so. Yet modern policing will try to find objective procedures to follow. These may be interesting to examine, as they operate in a quite similar way as some components of RightServicing.

However, we did not find any specific international legal framework for carrying out these policing selection methods. We will therefore examine one national code of conduct which, in a rather detailed way, provides instructions concerning the way police officers may select people for stopping and searching. The UK example will show us some tensions and complexities rather similar to the ones connected to some aspects of RightServicing.

Under the UK Police and Criminal Evidence Act 1984, a Code A of Practice for the exercise by police officers of statutory powers to stop and search and recording of police/public encounters, has been enacted.[35]

Under Article 1, we learn about the principles governing stop and search. Indeed, a policeman cannot stop and search as he pleases. We read in this respect:

[35] When these police actions are undertaken under the Terrorism Act a specific Code of Practice applied. The European Court of Human Rights has ruled that the stop and search powers under sections 44 to 47 of the Terrorism Act 2000 are not compatible with the right to a private life under Article 8 of the European Convention on Human Rights. However, the statute has not yet been repealed. For the purpose of present study, we do not further consider this Act.

"*1.1 Powers to stop and search must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination. The Equality Act 2010 makes it unlawful for police officers to discriminate against, harass or victimize any person on the grounds of the "protected characteristics" of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, marriage and civil partnership, pregnancy and maternity when using their powers. When police forces are carrying out their functions they also have a duty to have regard to the need to eliminate unlawful discrimination, harassment and victimization and to take steps to foster good relations*."

Furthermore, we read:

"*1.4 The primary purpose of stop and search powers is to enable officers to allay or confirm suspicions about individuals without exercising their power of arrest. Officers may be required to justify the use or authorization of such powers, in relation both to individual searches and the overall pattern of their activity in this regard, to their supervisory officers or in court. Any misuse of the powers is likely to be harmful to policing and lead to mistrust of the police. Officers must also be able to explain their actions to the member of the public searched. The misuse of these powers can lead to disciplinary action*."

It is also interesting to note that according to 1.5 of Code A, the consent of the person concerned is not, as such, determining:

"*1.5 An officer must not search a person, even with his or her consent, where no power to search is applicable. Even where a person is prepared to submit to a search voluntarily, the person must not be searched unless the necessary legal power exists, and the search must be in accordance with the relevant power and the provisions of this Code. The only exception, where an officer does not require a specific power, applies to searches of persons entering sports grounds or other premises carried out with their consent given as a condition of entry*."

Code A also discusses under 2. the concept of "reasonable grounds for suspicion":

" *2.2 Reasonable grounds for suspicion depend on the circumstances in each case. There must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind or, in the case of searches under section 43 of the Terrorism Act 2000, to the likelihood that the person is a terrorist. Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behavior by, the person concerned. For example, unless the police have a description of a suspect, a person's physical appearance (including any of the "protected characteristics" set out in the Equality Act 2010 (see paragraph 1.1), or the fact that the person is known to have a previous conviction, cannot be used alone or in combination*

with each other, or in combination with any other factor, as the reason for searching that person. Reasonable suspicion cannot be based on generalizations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity.

2.3 Reasonable suspicion may also exist without specific information or intelligence and on the basis of the behavior of a person. For example, if an officer encounters someone on the street at night who is obviously trying to hide something, the officer may (depending on the other surrounding circumstances) base such suspicion on the fact that this kind of behavior is often linked to stolen or prohibited articles being carried. Similarly, for the purposes of section 43 of the Terrorism Act 2000, suspicion that a person is a terrorist may arise from the person's behavior at or near a location which has been identified as a potential target for terrorists.

2.4 However, reasonable suspicion should normally be linked to accurate and current intelligence or information, such as information describing an article being carried, a suspected offender, or a person who has been seen carrying a type of article known to have been stolen recently from premises in the area. Searches based on accurate and current intelligence or information are more likely to be effective. Targeting searches in a particular area at specified crime problems increases their effectiveness and minimizes inconvenience to law-abiding members of the public. It also helps in justifying the use of searches both to those who are searched and to the public. This does not however prevent stop and search powers being exercised in other locations where such powers may be exercised and reasonable suspicion exists.

2.5 Searches are more likely to be effective, legitimate, and secure public confidence when reasonable suspicion is based on a range of factors. The overall use of these powers is more likely to be effective when up to date and accurate intelligence or information is communicated to officers and they are well-informed about local crime patterns."

The right use of powers to stop and search is also being monitored. According to 5.1 of Code A:

"*Supervising officers must monitor the use of stop and search powers and should consider in particular whether there is any evidence that they are being exercised on the basis of stereotyped images or inappropriate generalizations. Supervising officers should satisfy themselves that the practice of officers under their supervision in stopping, searching and recording is fully in accordance with this Code. Supervisors must also examine whether the records reveal any trends or patterns which give cause for concern, and if so take appropriate action to address this*."

We were somewhat surprised to read that, according to 4.3. of Code A, the record to be made of a search must always include a note of the self-defined ethnicity, and if

different, the ethnicity as perceived by the officer making the search, of the person searched or of the person in charge of the vehicle searched (as the case may be).

In the Note for Guidance, N°18 this recording obligation is further specified:

"*Officers should record the self-defined ethnicity of every person stopped according to the categories used in the 2001 census question listed in Annex B. The person should be asked to select one of the five main categories representing broad ethnic groups and then a more specific cultural background from within this group. The ethnic classification should be coded for recording purposes using the coding system in Annex B. An additional "Not stated" box is available but should not be offered to respondents explicitly. Officers should be aware and explain to members of the public, especially where concerns are raised, that this information is required to obtain a true picture of stop and search activity and to help improve ethnic monitoring, tackle discriminatory practice, and promote effective use of the powers. If the person gives what appears to the officer to be an "incorrect" answer (e.g. a person who appears to be white states that they are black), the officer should record the response that has been given and then record their own perception of the person's ethnic background by using the PNC classification system. If the "Not stated" category is used the reason for this must be recorded on the form*."

Annex B specifies the following Self-Defined Ethnic Classification Categories:

White
A. White - British
B. White - Irish
C. Any other White background
Mixed
D. White and Black Caribbean
E. White and Black African
F. White and Asian
G. Any other Mixed Background
Asian / Asian - British
H. Asian - Indian
I. Asian - Pakistani
J. Asian - Bangladeshi
K. Any other Asian background
Black / Black - British
L. Black - Caribbean
M. Black African
N. Any other Black background
Other O
O. Chinese
P. Any other

Not Stated

4.3 Relevance to RightServicing

What elements of this UK Code of practice could be considered relevant for our query concerning the limits and challenges of (some components) of RightServicing? The question is easily raised, but far more difficult to answer though. We believe that essentially the following elements could be highlighted:

1) In a very prominent way the power of stopping and searching is put under the condition that it is exercised without unlawful discrimination (with broad and clear enumeration of “protected characteristics”). Yet this does not preclude the very Code of conduct itself to prescribe the registration of a highly suspect feature, such as ethnic classification.

2) One has to be able, both in an individual case as by way of a policy, to specify the suspicions on the basis of which is acted; correspondingly others can verify their appropriateness.

3) Consent for searching does not free the controller from the rules governing the exercise of the power of searching.

4) Reasonable suspicion should have an objective basis and thus be based on facts, information and/or intelligence which is relevant; it may also be based on the behavior of the person concerned.

5) Reasonable suspicion cannot be based on generalizations of stereotypical images of certain groups or categories of people.

6) Intelligence or information gains in value when it is accurate, current and proceeding from a range of factors.

5 Non-discrimination

After thoroughly discussing the privacy aspect of the RightServicing approach, as well as having focused our attention on the most relevant aspects of its profiling aspect, we will now discuss another important matter: the principle of non-discrimination.

This aspect cannot be underestimated, since the application of the RightServicing system will not only depend on the information that can or cannot be processed, but also on what can be done on the basis of that information. It will thus be of the greatest importance to ensure that the RightServicing approach will not violate this general principle as it has been outlined by various legal instruments.

In this chapter we will once again discuss the various relevant legal instruments at hand, starting with the relevant regulations at EU-level, followed by those at the level of the Council of Europe and those on international level.

5.1 Legal framework at the level of the European Union (EU)

From the start of its combat against discrimination, the EU focused on the prohibition of discrimination based on nationality (art. 18 TFEU: nationality in general and art. 45 (2) TFEU: nationality between workers) and gender (art. 157 (1) TFEU: equal pay for work of equal value).[36] Since the Amsterdam Treaty the EU was also able to take action in combatting other forms of discrimination (art. 19 TFEU: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation). Although most of these Treaty articles have direct effect[37], the EU has adopted several directives or has introduced specific provisions in regulations in order to ensure the accurate implementation of the principles of equality and non-discrimination in social security law. [38]

[36] R. NIELSEN, "Is European Union equality law capable of addressing multiple and intersectional discrimination yet?" in D. SCHIEK & V. CHEGE (eds.), *European Union Non-Discrimination Law,* Abingdon, Routledge-Cavendish, 2009, 37; M. DE MOL, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?", *Maastricht Journal of European and Comparative Law* 2011, 114; S. SMIS, C. JANSSENS, S. MIRGAUX & L. VAN LAETHEM, *Handboek Mensenrechten*, Antwerpen, Intersentia, 2011, 551; L. WADDINGTON & M. BELL, "More equal than others: Distinguishing European Union Equality Directives", *Common Market Law Review* 2001, 587; L. WADDINGTON, "Testing the Limits of the EC Treaty Article on non-discrimination", *Industrial Law Journal* 1999, 134.

[37] Exception: art. 19 TFEU.

[38] E.g.: Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**;** Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613; art. 4 Regulation 883/2004 on the coordination of social security; art. 7 Regulation 1612/68 on freedom of movement for workers within the community.

We will analyze the different primary and secondary legislation within the legal framework at the EU-level in the following order:

(1) Scope of application;

(2) The different kinds of discrimination and their content;

(3) The possible justifications of discrimination;

(4) The possible derogations of equal treatment;

(5) The possibility of positive action.

These elements will be elaborated throughout an intensive review of the following EU legislation: TFEU (art. 18, 19, 45), Regulation 883/2004 (art. 4), Regulation 1612/68 (art. 7), Directive 79/7 (art. 4), Directive 2000/43 (art. 2), Proposal for a new Council Directive (art. 2).

As this part of the project needs to be limited in order to ensure its feasibility, the main focus will be on EU legislation, legal doctrine and case law of the Court of Justice of the European Union (CJEU) concerning **statutory social security law**. Consequently, legislation[39], doctrine and case law concerning employment, occupation and occupational social security[40] will only be taken into account if they can provide interesting information for the area of statutory social security.[41]

Only the more recent legislation clarifies the concepts it uses, such as direct discrimination, indirect discrimination, positive action etc. This is not the case for older legislation. As a result, the case law of the CJEU became more important as it tried to provide a correct interpretation of these concepts. The Court also plays an important role as it often needs to decide whether differences in treatment need to be considered as discriminatory or not. It will be interesting to see which criteria the CJEU has adopted for this assessment.

We will start by discussing the prohibition of discrimination based on nationality, gender and race. Afterwards, other prohibited grounds of discrimination will be considered. In

[39] E.g.: Art. 157 TFEU, Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.

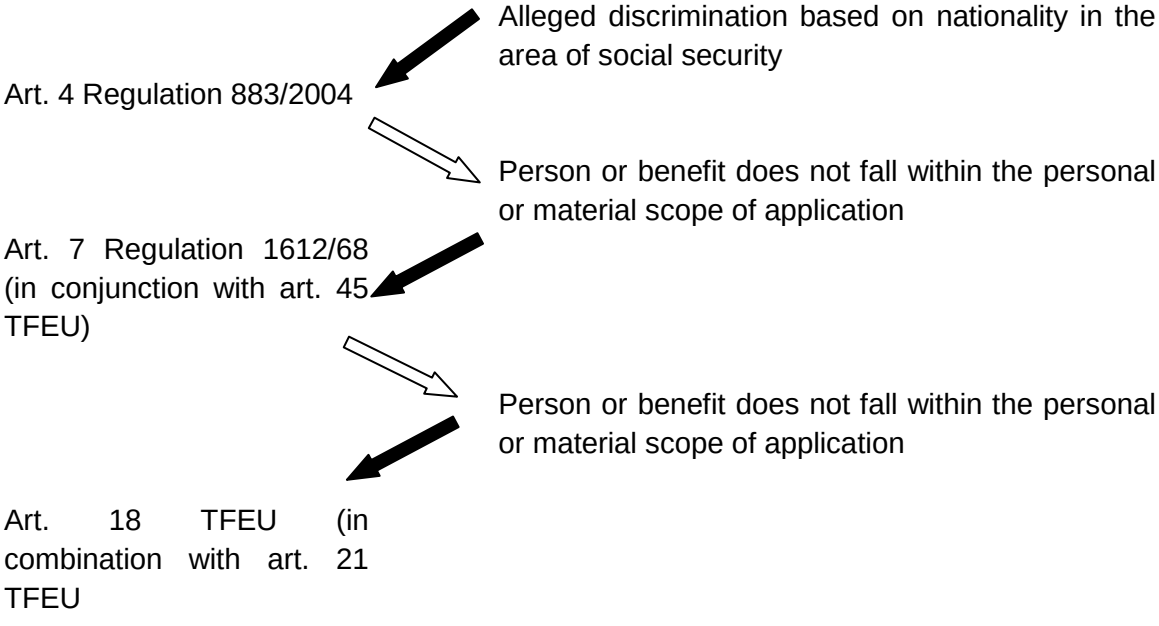
[40] Considered as "pay" under art. 157 TFEU and therefore falling under the employment and occupation provisions concerning salaries and other considerations a worker receives directly or indirectly in respect of his employment from his employer.

[41] Therefore the General Framework Directive (2000/78) and the Recast Directive (2006/54) will not be considered as they do not cover statutory social security schemes or state schemes providing social protection; D. SCHIEK, "A New Framework on Equal Treatment of Persons in EC Law?"*, European Law Journal* 2002, 300; L. WADDINGTON & M. BELL, "More equal than others: Distinguishing European Union Equality Directives", *Common Market Law Review* 2001, 590.

the end, we will use the results from this framework to draw conclusions regarding the use of segmenting in the RightServicing approach.

5.1.1 Discrimination on the grounds of nationality

The prohibition of discrimination based on nationality is an important and already long-established principle of the EU law, especially in the light of the fundamental freedoms. Therefore, also in statutory social security cases, discrimination based on nationality needs to be considered in connection with these internal market considerations.[42] Several provisions of the Treaties and Regulations deal with the principle of non-discrimination based on nationality: art. 18 TFEU, art. 45 (2) TFEU, art. 4 Regulation 883/2004 and art. 7 Regulation 1612/68. It will soon become clear that the following hierarchy applies[43]:



5.1.1.1 Article 18 TFEU

5.1.1.1.1 Article 18 TFEU in general

Art. 18 TFEU expresses the prohibition of discrimination based on nationality. Because this article has a general character, it is often repeated or specified in other provisions in primary or secondary EU law. For example: art. 45 TFEU, art. 4 Regulation 883/2004, art. 7 Regulation 1612/68, etc. The CJEU has ruled that in every case the most specific

[42] P. CRAIG & G. DE BURCA, *EU Law. Text, cases and materials,* Oxford, Oxford University Press, 1998, 68; S. SMIS, C. JANSSENS, S. MIRGAUX & L. VAN LAETHEM, *Handboek Mensenrechten*, Antwerpen, Intersentia, 2011, 552.
[43] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 111.

non-discrimination provision has to be applied.[44] Consequently, art. 18 TFEU does not apply independently where the Treaty lays down a specific prohibition of discrimination, such as art. 45 (2) TFEU.[45] This ruling of the Court affirms the legal principle of *lex specialis derogat legi generali.* Art. 18 TFEU remains nevertheless important for subject matters falling outside the scope of more specific non-discrimination provisions.

Art. 18 TFEU:

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

As clearly indicated in the article, the prohibition of discrimination only applies to situations which are governed by EU law.[46] Art. 18 TFEU has vertical direct effect[47] and has limited horizontal direct effect. Limited horizontal effect implicates that the article has only horizontal direct effect if the denial of such direct effect would cross the exercise of the fundamental freedoms.[48] However, as statutory social security nearly always implicates a relation between government and individuals, vertical direct effect is sufficient.

Art. 18 TFEU clearly prohibits direct discrimination based on nationality. The CJEU nevertheless acknowledges in some cases that a difference in treatment explicitly based on nationality will not constitute discrimination if the difference in treatment is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued.[49] However, administrative convenience will never be able to justify a difference in treatment based on nationality.[50]

Also *"all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result"* are prohibited by art. 18 TFEU.[51] Indirect discrimination will occur when a Member State links the grant of a right to an individual

[44] CJEU C-10/90, *Masgio* [1991], *ECR* 1991, I-01119, paragraph 12.
[45] CJEU C-419/92, *Scholz* [1994], *ECR* 1994, I-00505, parapgraph 6.
[46] K. LENAERTS & P. VAN NUFFEL, *European Union* Law, London, Sweet & Maxwell, 2011, 158.
[47] CJEU C-92/92 and C-326/92 (joined cases) *Phil Collins* [1993], ECR 1993, I-5145, paragraphs 34-35.
[48] CJEU C-36/74, *Walrave and Koch* [1974], *ECR* 1974, 01405, paragraphs 16-18; CJEU C-411/98 *Ferlini* [2000], *ECR* 2000, I-08081, paragraph 50; M. DE MOL, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?", *Maastricht Journal of European and Comparative Law* 2011, 116; K. LENAERTS & P. VAN NUFFEL, *European Union* Law, London, Sweet & Maxwell, 2011, 158.
[49] CJEU C-524/06, *Huber* [2008], *ECR* 2008, I-09705, paragraph 75; CJEU C-164/07, *Wood* [2008], *ECR* 2008, I-04143, paragraph 13, CJEU C-85/96, *Martínez Sala* [1998], *ECR* 1998, I-02691*,* paragraph 64.
[50] Adv. Gen. P. MADURO, opinion on *Huber* [C-524/06], *ECR* I-09705, paragraph 22; CJEU C-29/82, *van Luipen* [1983], *ECR* 1983, 00151, paragraph 12.
[51] CJEU C-29/95, *Pastoors and Trans-Cap* [1997], *ECR* 1997, I-00285*,* Paragraph 15; CJEU C-22/80, *Boussac* [1980]*, ECR* 1980, 03427, paragraph 9.

to the residence of this individual on the territory of the Member State.[52] However, not every difference in treatment indirectly based on nationality must be considered as being discriminatory. According to the Court's case law, such difference in treatment is acceptable when it can be justified by objective circumstances and when it is proportionate to the aim pursued.[53] In *Bidar* and *Förster* the Court held that although Member States must, in the organization and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for a Member State to ensure that the grant of social assistance to nationals of other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State.[54] For example, a Member State can demand a certain degree of integration into its society and therefore grant the assistance only to nationals of other Member states if they have resided in the host Member State for a certain length of time (e.g. five years[55]).

5.1.1.1.2 The combination of articles 18 TFEU, 20 TFEU and 21 TFEU

The CJEU has judged that, in order to invoke art. 18 TFEU, the facts of the case need to fall within the material or personal scope of EU law. [56] Regarding the personal scope, two approaches are possible: on the one hand individuals can only fall under the personal scope of EU law if they personally are in a situation which is governed by EU law.[57] On the other hand, all citizens of the EU fall under the personal scope of EU law because European citizenship (and its rights and duties) is laid down in art. 20 and art. 21 TFEU. In *Martínez Sala*, the Court chose the latter approach by stating that a national of a Member State lawfully residing in the territory of another Member State comes within the personal scope of the Treaty provisions on European citizenship.[58] This reasoning can be explained as follows: article 18 TFEU proclaims – within the scope of the Treaties – the prohibition of discrimination based on nationality. Art. 20 TFEU establishes the concept of citizenship.[59] Finally, art. 21 TFEU not only lays down the principle that citizens of the Union have the right to move and reside freely within the territory of the Member States, but also that every citizen of the Union shall enjoy the rights and duties provided for in the Treaties. According to the CJEU, the principle of non-discrimination based on nationality (art. 18 TFEU) is such a right provided for by the

[52] CJEU C-186/87, *Cowan* [1989], ECR 1989, 00195, paragraph 10.
[53] CJEU C-224/00, *Commission v Italy* [2002], *ECR* 2002, I-02965, Paragraph 20; CJEU C-29/95, *Pastoors and Trans-Cap* [1997], *ECR* 1997, I-00285, Paragraph 19.
[54] CJEU C-158/07, *Förster* [2008], *ECR* 2008, I-08507, paragraph 48; CJEU C-209/03, *Bidar* [2005], *ECR* 2005, I-02119, paragraph 56.
[55] CJEU C-158/07, *Förster* [2008], *ECR* 2008, I-08507, paragraph 52-54.
[56] CJEU C-85/96, *Martínez Sala* [1998], *ECR* 1998, I-02691; F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 141.
[57] M. BELL, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, 40.
[58] CJEU C-85/96, *Martínez Sala* [1998], *ECR* 1998, I-02691, paragraph 61.
[59] *"Every person holding the nationality of a Member State shall be a citizen of the Union."*

Treaties.[60] Consequently, EU citizens, residing in another Member State, are also protected against discrimination based on nationality with respect to e.g. entitlement to a child-raising allowance, minimum subsistence allowance, etc.[61]

With respect to statutory social security, this combination of art. 18, 20 and 21 TFEU is interesting in two situations. (1) When it is unclear whether an individual, claiming to be discriminated based on nationality, falls within the personal scope of application of Regulations 883/2004 or 1612/68. (2) When it is clear that such an individual does not fall within the personal scope of those regulations. Such individuals (which are often not employees or self-employed people) will still be able to dispute the alleged discrimination based on the combination of art. 18, 20 and 21 TFEU.

5.1.1.2 Article 45 (2) TFEU

Art. 45 (2) TFEU is a specification of the general principle in art. 18 TFEU: it prohibits discrimination based on nationality in the area of employment, with the exception of employment in public service (art. 45 (4) TFEU).[62]

Art. 45 (2) TFEU:

Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

Article 45 (2) TFEU was the basis for the non-discrimination provisions in Regulations 883/2004 en 1612/68. This has two important consequences: (1) the provisions of the Regulations may not infringe the principle of non-discrimination as set out in art. 45 (2) TFEU.[63] (2) For the interpretation of the non-discrimination provisions of both Regulations the CJEU uses art. 45 TFEU. [64] Because of this, it is interesting to take a closer look at the scope of art. 45 (2) TFEU.

Art. 45 (2) has both vertical[65] and horizontal[66] direct effect, whereas art. 18 TFEU has only limited horizontal direct effect.[67] However, this does not necessarily imply that the

[60] CJEU C-85/96, *Martínez Sala* [1998], *ECR* 1998, I-02691*,* paragraph 61-62.
[61] CJEU C-85/96, *Martínez Sala* [1998], *ECR* 1998, I-02691, CJEU C-184/99, *Grzelczyk* [2001], *ECR* 2001, I-06193.
[62] P. CRAIG & G. DE BURCA, *EU Law. Text, cases and materials,* Oxford, Oxford University Press, 1998, 666.
[63] CJEU C-41/84, *Pinna* [1986], *ECR* 1986, 00001, paragraph 22-24; F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 134.
[64] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 133.
[65] CJEU C-167/73, *Commission v France* [1974], *ECR* 1974, 00359, paragraphs 33 and 41.
[66] CJEU C-281-/98, *Angonese* [2000], *ECR* 2000, I-04139, paragraph 35-36; CJEU C-36/74, *Walrave and Koch* [1974], *ECR* 1974, 01405, paragraph 16.

scope of art. 18 TFEU is more restricted than the scope of art. 45 (2) TFEU.[68] Whereas art. 18 TFEU prohibits discrimination "*within the scope of application of the Treaties"*, the prohibition prescribed in art. 45 (2) TFEU is limited to *"employment, remuneration and other conditions of work and employment"*. Consequently, art. 45 (2) TFEU can only be applied in the area of employment law, whereas art. 18 TFEU can for example also apply to hospital and medical care.[69]

Art. 45 (2) prohibits direct discrimination based on nationality. However, art. 45 (3) TFEU explicitly allows a justification of such discrimination on grounds of public policy, public security or public health.[70] Moreover, a justification based on those grounds can only be accepted as long as it is proportional to the objective pursued.[71] Although the CJEU has ruled that e.g. the concept of public policy needs to be interpreted restrictively[72], Member States are often given a margin of appreciation. In *Bouchereau*, the Court explained that the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another. Therefore, the Court finds it necessary to allow Member States an area of discretion.[73] The same goes for public security.[74] As art. 45 (3) TFEU provides for a closed system for justification, a Member State cannot use other grounds to justify a difference in treatment explicitly based on nationality, such as administrative problems.[75] Finally, since art. 45 (2) TFEU has both vertical and horizontal effect, also individuals can rely on these justification grounds in private disputes.[76]

According to the CJEU, article 45 (2) TFEU not only prohibits overt discrimination by reason of nationality, but also all covert forms of discrimination which, by the application of other distinguishing criteria, in fact lead to the same result.[77] In *O'Flynn***,** the CJEU reaffirmed that indirect discrimination can be justified by objective considerations

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[67] M. DE MOL, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?", *Maastricht Journal of European and Comparative Law* 2011, 117.
[68] M. DE MOL, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?", *Maastricht Journal of European and Comparative Law* 2011, 117.
[69] M. DE MOL, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?", *Maastricht Journal of European and Comparative Law* 2011, 117.
[70] Affirmed by the CJEU in C-41/74, *Van Duyn* [1974], ECR 1974, 01337, paragraph 21.
[71] This condition of proportionality is added both by case law (e.g. CJEU C-101/94, *Commission v Italy* [1996], *ECH* 1996, I-02691, paragraph 25 and 26) and by art. 27 (2) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation. K. LENAERTS & P. VAN NUFFEL, *European Union* Law, London, Sweet & Maxwell, 2011, 251.
[72] C-41/74, *Van Duyn* [1974], ECR 1974, 01337, paragraph 33.
[73] CJEU C-30/77 *Bouchereau* [1977], *ECR* 1977, 01999, paragraph 34.
[74] CJEU C-83/94, *Leifer* [1995], ECR I-3231, paragraph 35.
[75] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 113.
[76] CJEU C-415/93, *Bosman* [1995], *ECR* 1995, I-04921, paragraph 86.
[77] CJEU C-419/92, *Scholz* [1994], *ECR* 1994, I-00505, parapgraph, CJEU C-15/69, *Württembergische Milchverwertung-Südmilch-AG* [1969], *ECR* 1969, 00363, paragraph 6.

independent of the nationality of the workers concerned, under the condition that the measures are proportionate to the legitimate aim pursued.[78] It is clear that because of this general rule, the possibilities for justifying indirect discrimination are broader than those explicitly mentioned for direct discrimination (art. 45 (3) TFEU).[79]

The case law of the CJEU on art. 45 (2) TFEU does not only prohibit discrimination based on nationality, but also any obstacle hindering or rendering less attractive the exercise of the freedom of movement.[80] In *Terhoeve*, the Court clarified that provisions which preclude or deter a national of a Member State from leaving his/her country of origin in order to exercise his/her right to the freedom of movement constitute an obstacle to that freedom.[81] As the national legislation under review constituted such an obstacle, the Court decided to a violation of art. 45 TFEU without finding it necessary to even consider whether there was an indirect discrimination based on nationality.[82] In *Government of the French Community and Walloon Government v Flemish Government,* the Court reaffirmed this case law by stating that art. 45 TFEU opposes against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty.[83] Such national measures may only be allowed if they pursue a legitimate objective in the public interest, if they are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued.[84]

This case law could be seen as an extension of the scope of art. 45 TFEU.[85] However, it might also be considered as a specific elaboration of the general rule that Member States are free to organize their social security systems, provided that they do not infringe EU law when exercising that power.[86]

5.1.1.3 Article 4 of Regulation 883/2004

With respect to social security, the prohibition of discrimination on grounds of nationality is explicitly repeated in art. 4 of Regulation 883/2004 (former art. 3 (1) Regulation

[78] CJEU C-237/94, *O'Flynn* [1996], *ECR* 1996, I-02617, paragraph 19.
[79] P. CRAIG & G. DE BURCA, *EU Law. Text, cases and materials,* Oxford, Oxford University Press, 1998, 669.
[80] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 135.
[81] CJEU C-18/95, *Terhoeve* [1999], *ECR* 1999, I-00345, paragraph 39.
[82] CJEU C-18/95, *Terhoeve* [1999], *ECR* 1999, I-00345, paragraph 41.
[83] CJEU, C-212/06, *Government of the French Community and Walloon Government v Flemish Government* [2008], *ECR* 2008, I-1683, paragraph 45.
[84] CJEU, C-212/06, *Government of the French Community and Walloon Government v Flemish Government* [2008], *ECR* 2008, I-1683, paragraph 55.
[85] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 135
[86]CJEU C-110/79, *Coonan* [1980], *ECR* 1980, 01445, paragraph 12; CJEU 33/99, *Fahmi and Amado* [2001], ECR 2001, I-02415, paragraph 25.

1408/71). In 1978 the CJEU ruled that this provision has direct effect.[87] Although it is a freestanding article, the CJEU uses art. 45 TFEU to interpret it.[88]

Art. 4 of Regulation 883/2004:

Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

5.1.1.3.1 Scope of application

Art. 2 of the Regulation determines the personal scope of application. This article clarifies that the Regulation applies to (1) nationals of a Member State, (2) stateless persons, (3) refugees residing in a Member State who have been subject to the legislation of one or more Member States, (4) as well as to members of their families and to their survivors and to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.

The material scope of application is clearly indicated by a limited list of benefits covered by the Regulation. As the list is exhaustive, benefits not explicitly mentioned do not fall under the material scope of the Regulation.[89] Art. 3 sums up the following benefits: sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family benefits. When a benefit can be categorized under one of these, it falls under the material scope of the Regulation regardless of the fact whether it is part of a general or a special social scheme or whether it is a contributory or a non-contributory scheme (art. 3 (2) Regulation). This is affirmed by the case law of the CJEU that gives a broad interpretation to "social security benefit": a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position, and provided that it concerns one of the risks expressly listed in Article 3 (1) of the Regulation.[90] Although this interpretation of the concept "social security benefit" seems rather broad, the Court is very strict regarding the condition that the benefit must be linked with one of the risks listed in the Regulation. A branch of social security which is not mentioned in the list does not fall within the material scope even if it confers upon individuals a legally defined

[87] CJEU C-1/78, *Kenny* 1978, *ECR* 1978, 01498, paragraph 12.
[88] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 133.
[89] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 47.
[90] CJEU C- 185/96, *Commission v Greece* [1998], *ECR* 1998, I-06601, paragraph, 25; *Commission v Luxembourg* [1993], *ECR* 1993, I-00817, paragraph 29.

position entitling them to benefits.[91] Finally, the Regulation itself explicitly excludes the application of the Regulation to social and medical assistance (art. 3).

5.1.1.3.2 Prohibition of discrimination and possible justifications

Art. 4 of the Regulation opposes to discrimination based on nationality. The Court has clarified that although each Member State lays down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, they must always make sure that in this connection they do not infringe EU law, such as the prohibition of discrimination between nationals of the host Member State and nationals of the other Member States.[92]

Art. 4 Regulation 883/2004 prohibits direct discrimination based on nationality. However, as art. 45 TFEU is used to interpret art. 4 of the Regulation, the grounds for justification (as set out in art. 45 (3) TFEU) can also be applied to the Regulation. Consequently, a difference in treatment explicitly based on nationality and falling under the scope of the Regulation can be justified for reasons of public policy, public security or public health.[93] As art. 45 (3) TFEU provides for a closed system for justification, a Member State cannot use other grounds to justify a difference in treatment, such as administrative problems.[94]

In *Government of the French Community and Walloon Government v Flemish Government*, the Court was confronted with the legislation of a federated entity which limited the affiliation to a scheme and the entitlement to benefits provided by that scheme to persons residing in the territory coming within that entity's competence and to persons pursuing an activity in that territory and residing in another Member State. This resulted in the fact that persons who work in that territory but reside in the territory of another federated entity of the same State were excluded. In this case, the Court clarified that its case law on 45 TFEU – prohibiting not only discrimination based on nationality but also any obstacle to the exercise of the freedom of movement – is also applicable to art. 4 of Regulation 883/2004.[95]

Art. 4 also prohibits indirect discrimination based on nationality.[96] In *Toia*, the CJEU acknowledged this by stating that art. 4 of the Regulation not only prohibits patent discrimination, based on the nationality of the beneficiaries of social security schemes, but also all disguised forms of discrimination which, by the application of other

[91] CJEU C-249/83, *Hoeckx* [1985], *ECR* 1985, 00973, paragraph 12.
[92] CJEU C-110/79, *Coonan* [1980], *ECR* 1980, 01445, paragraph 12; CJEU 33/99, *Fahmi and Amado* [2001], ECR 2001, I-02415, paragraph 25.
[93] CJEU C-10/90, *Masgio* [1991], *ECR* 1991, I-01119, paragraph 24; F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 113 and 133-134.
[94] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 113.
[95] CJEU, C-212/06, *Government of the French Community and Walloon Government v Flemish Government* [2008], *ECR* 2008, I-1683, paragraph 59.
[96] C. TOBLER, *Indirect discrimination*, Antwerp, Intersentia, 2005, 139; F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 114.

distinguishing criteria, lead in fact to the same result.[97] This is for example the case when conditions which are applicable without distinction, can more easily be satisfied by nationals than non-nationals or when there is a risk that they may operate to the particular detriment of migrant non-nationals.[98] Indirect discrimination with respect to nationality will often occur when residence is a condition for entitlement to a benefit.[99] Also constituting indirect discrimination is national legislation which excludes a given category of workers, largely nationals of other Member States (such as foreign-language assistants), from a social security scheme which is in general available to other workers in that Member State.[100]

However, not every measure disadvantaging a significantly higher proportion of members of a group other than the nationals of a Member state, will constitute an indirect discrimination.[101] According to the CJEU's case law, such measures can be objectively justified if they are necessary, appropriate and proportional regarding the objective pursued.[102]

5.1.1.4 Article 7 of Regulation 1612/68

The non-discrimination provision of Regulation 1612/68 on freedom of movement for workers within the Community is interesting for social benefits which are excluded from the scope of Regulation 883/2004. In this respect, art. 7 (2) of Regulation 1612/68 extends the prohibition of discrimination based on nationality to social advantages.[103] Article 7(2) of the Regulation is also an expression of the principle of equal treatment as set forth in art. 45 (2) TFEU. Therefore, this article needs to be interpreted in the same way as article 45 (2) TFEU.[104]

Art. 7 Regulation 1612/68:

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.
2. He shall enjoy social and tax advantages as national workers.
[…]

[97] CJEU C-237/78, *Toia* [1979], *ECR* 1979, 02645, Paragraph 12.
[98] CJEU C-124, *Borawitz* [2000], *ECR* 2000, I-07293, paragraph 25.
[99] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 114.
[100] CJEU C-33/88, *Allué and Coonan* 1989, *ECR* 1989, 01591, 21.
[101] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 114.
[102] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 114.
[103] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 134; C. TOBLER, *Indirect discrimination*, Antwerp, Intersentia, 2005, 135.
[104] CJEU C-287/05, *Hendrix* [2007], *ECR* 2007, I-06909, paragraph 53.

5.1.1.4.1 Scope of application

The personal scope of application is limited to workers, excluding self-employed and non-active persons. The meaning of the term "workers" of Regulation 1612/68 is related to art. 45 TFEU.[105] In this respect, a relationship of employment is a necessary element, which implicates that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.[106] Regarding frontier workers, the Court referred in *Meints* to the fourth paragraph of the Regulation's preamble. This paragraph explicitly states that also seasonal and frontier workers may not be discriminated. Consequently, a Member State may not make the grant of social advantages dependent on their residence in its territory.[107]

With respect to individuals who lost their job but are intensively seeking another one, the Court decided that (1) once the employment relationship has ended, a person loses his/her status of worker. Nevertheless, that status may still produce certain effects after the relationship has ended. (2) A person who is genuinely seeking work must also be classified as a worker.[108] A contrario, a person who has never worked before and is seeking a job will not be considered as a "worker".[109]

In some circumstances family members of workers also enjoy the protection of the non-discrimination principle. Two conditions need to be fulfilled: (1) the social advantage pertains to the employed person (2) and the employed person is supporting the family member [110]

The CJEU has given a broad interpretation to "social advantages" and this has resulted in a large material scope of application of the Regulation. The concept "covers all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their ordinary residence in the national territory, and the extension of which to migrant workers therefore seems likely to facilitate their mobility within the Community".[111]

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[105] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 122.
[106] CJEU C-66/85, *Lawrie-Blum* [1986], *ECR* 1986, 02121, paragraph 17.
[107] CJEU C-57/96, *Meints* [1997], *ECR* 1997, I-06689, paragraphs 50-51. See also CJEU C-337/97, *Meeusen* [1999], *ECR* 1999, I-03289, paragraph 21.
[108] CJEU C-85/96, *Martínez Sala* [1998], *ECR* 1998, I-02691*,* paragraph 32.
[109] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 124.
[110] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 125.
[111] CJEU C-287/05, *Hendrix* [2007], *ECR* 2007, I-06909, paragraph 48; CJEU C-213/05, *Geven* [2007], *ECR* 2007, I-06347, paragraph 12; CJEU C-85/96, *Martínez Sala* [1998], *ECR* 1998, I-02691*,* paragraph 25; CJEU C-249/83, *Hoeckx* [1985], *ECR* 1985, 00973, paragraph 20.

5.1.1.4.2 Prohibition of discrimination and possible justifications

Art. 7 of the Regulation clearly prohibits direct discrimination based on nationality. However, as already mentioned, art. 45 TFEU is used to interpret art. 7 of the Regulation. Therefore, the closed system of justification (as provided for in art. 45 (3) TFEU) can also be applied to art. 7 of the Regulation.[112] Consequently, a difference in treatment explicitly based on nationality can be justified for reasons of public policy, public security or public health. These limited grounds for justification are also listed in the first paragraph of the preamble of Regulation 1612/68.

Because art. 7 (2) of the Regulation needs to be interpreted in the light of art. 45 TFEU, the scope of art. 7 (2) is not limited to the prohibition of discrimination. As clearly mentioned in *Terhoeve*, art. 7 (2) of Regulation 1612/68 does also prohibit any obstacle to the freedom of movement.[113] This case law implies that the grant of social advantages (falling within the ambit of art. 7(2) of the Regulation) not only has to be non-discriminatory on grounds of nationality, but that the entitlement criteria may also not constitute a hindrance to the exercise of the freedom of movement as guaranteed under art. 45 TFEU.[114]

Art. 7 of the Regulation also prohibits indirect discrimination.[115] This protection is, according to the CJEU, necessary to ensure the effective working of one of the fundamental principles of the Community. Moreover, it is explicitly recognized by the fifth recital of the preamble which prescribes that equality of treatment of workers shall be ensured "in fact and in law".[116] A national measure is indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that will place the former at a particular disadvantage, unless the measure is objectively justified, independent of the nationality of workers, and proportionate to the aim pursued.[117] With respect to this justification, the CJEU accepted a national rule which only granted a child-raising allowance to nationals and to frontier workers who carried an occupation in the Member State which exceeded the threshold of minor employment. The Court found that the refusal of granting such allowance to frontier workers who did not exceed the threshold could be legitimately justified by the fact the Member state asks for a sufficiently substantial occupation in its territory in order

[112] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 133-134.
[113] CJEU C-18/95, *Terhoeve* [1999], *ECR* 1999, I-00345, paragraph 41.
[114] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 113.
[115] CJEU C-213/05, *Geven* [2007], *ECR* 2007, I-06347, paragraph 18; CJEU C-35/97, *Commission v France* [1998], *ECR* 1998, I-05325, paragraph 37; CJEU C-111/91, *Commission v Luxembourg* [1993], *ECR* 1993, I-00817, paragraph 9.
[116] CJEU C-152-73, *Sotgiu* [1974], *ECR* 1974, 00153, paragraph 11.
[117] CJEU C-213/05, *Geven* [2007], *ECR* 2007, I-06347, paragraph 19; CJEU C-237/94, *O'Flynn* [1996], *ECR* 1996, I-02617, paragraph 19-20; CJEU C-57/96, *Meints* [1997], *ECR* 1997, I-06689, paragraph 45; CJEU C-35/97, *Commission v France* [1998], *ECR* 1998, I-05325, paragraph 38.

to establish sufficient integration into its society. The Court found that the measure was appropriate and proportionate to the objective. [118]

5.1.2 Discrimination based on gender

Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security is of utmost importance for the combat of gender discrimination. The word "progressive" indicates that this Directive has a limited scope of application: only statutory social security is envisaged and even some statutory schemes fall outside the material scope.[119] Article 4 states that:

Art. 4 of Directive 79/7:

The principle of equal treatment means that there shall be no discrimination whatsoever on the ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:
- the scope of schemes and the conditions of access thereto,
- the obligation to contribute and the calculation of contributions,
- the calculation of benefits including increases due in respect of a spouse and for dependents and the conditions governing the duration and retention of entitlement to benefits.

In *The Netherlands v FNV*, the CJEU needed to decide whether art. 4 of the Directive had direct effect if a Member State had failed to implement the Directive before the deadline for implementation or if the Directive was only partially implemented. The Court ruled that since article 4 precludes, generally and unequivocally, all discrimination on grounds of sex, the provision is sufficiently precise to be relied upon in legal proceedings by an individual and applied by the courts.[120] The fact that this direct effect only has a vertical character[121] does not cause many problems because statutory social security will nearly always concern the relation between government and individual.

5.1.2.1 Scope of application

In order to invoke the non-discrimination provision of Directive 79/7, a case needs to fall within both the personal scope (art. 2) and the material scope (art. 3) of application of

[118] CJEU C-213/05, *Geven* [2007], *ECR* 2007, I-06347, paragraph 21-30.
[119] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 306.
[120] CJEU C-71/85, *The Netherlands v FNV* [1986], *ECR* 1986, 03855, paragraph 18. This was later on affirmed in CJEU C-286/85, *McDermott qnd Cotter* [1987], *ECR* 1987, 01453, paragraph 16 and CJEU C-139/95, *Balestra* [1997], *ECR* 1997, I-00549, paragraph 32.
[121] Directives will never have horizontal direct effect as a Directive only puts a Member State under obligations.

the Directive.[122] It will become clear that, although both scopes are strongly intertwined, they nevertheless constitute two separate tests.[123]

5.1.2.1.1 Personal scope of application

Directive 79/7 applies to all members of the working population and retired or invalided workers. Art. 2 of the Directive clarifies who belongs to the "working population": (1) employees or self-employed persons (2) workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment (3) those persons who are seeking employment. It is clear that the Directive focuses on individuals who have a link to the labour market.[124] There has been a lot of case law and discussion about this personal scope of application.

5.1.2.1.1.1 Cases

Drake

Mrs. *Drake* applied for an invalidity care allowance which was granted to individuals who take care for a person that was unable to care for him-/herself. However, this benefit was not granted to women who still lived with their husbands. Mrs. Drake alleged a direct discrimination based on gender. The question was whether Mrs. Drake fell within the personal scope of application of the Directive as she had interrupted her work not because she was disabled but because the risk of invalidity had occurred to her mother and she wanted to take care of her.

The CJEU ruled that Mrs. Drake remained part of the working population. Article 2 of the Directive is based on the idea that a person whose work has been interrupted by one of the risks referred to in Article 3 (i.e. material scope of application: sickness, invalidity, old age, accidents at work and occupational diseases and unemployment) belongs to the working population. This was the case with Mrs. Drake, who had given up work solely because of one of the risks listed in Article 3, namely the invalidity of her mother, had occurred.[125]

It is clear that in this case the CJEU adopted a very broad interpretation of the personal scope of application of Directive 79/7.

[122] CJEU C-48/88, *Achterberg-te Riele and others* [1989], *ECR* 1989, 01963, paragraph 16.
[123] K. KLAUS, D. PIETERS AND B. ZAGLMAYER, *Social Security Cases in Europe: The European Court of Human Rights,* Antwerp, Intersentia, 2007, 391 p. (Henceforth: *Social Security Cases in Europe*, 2007).
[124] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 306.
[125] CJEU C-150/85, *Drake* [1986], *ECR* 1986, 01995, paragraph 22.

Achterberg–te Riele and others

In *Achterberg-te Riele and others*, the CJEU was confronted with a new problem. The applicants consisted of several women who either had given up their work or who had never worked in order to look after their children. These women claimed gender discrimination in the area of old-age pensions. However, the applicants had interrupted their work because of a risk which was not listed in art. 3 of the Directive. Consequently, the question was if these women could be considered as "working population".

The Court made clear that the Directive does not apply to persons who have never been available for employment or who have ceased to be available for a reason other than the materialization of one of the risks referred to by the Directive.[126] As the material scope does not cover family risks, the applicants could not fall under the personal scope of application.

This judgment was sharpened in *Johnson*.

Johnson

In this case, the CJEU re-emphasized the relation between the element of employment and the element of risk. Mrs. Johnson had given up her work for some years in order to take care of her daughter. During this period, she had developed a serious back condition which rendered her unable to return to work. She was refused a disablement allowance because she was cohabiting with her partner. Since this restriction did not apply to men, Mrs. Johnson claimed a gender discrimination and therefore a breach of art. 4 of the Directive. In this case, the Court needed to answer two questions.

The first question was: does a person who has interrupted his or her occupational activity in order to attend to the upbringing of his or her children and who is prevented by illness from returning to work fall within the personal scope of Directive 79/7?

For the answer of this question the Court repeated its case law of *Achterberg-te Riele*: a person who has given up his or her occupational activity in order to attend to the upbringing of his or her children does not fall within the scope of Directive 79/7, since the interruption of employment due to the bringing up of children is not one of the risks listed in Article 3 of the Directive.[127]

The second question concerned the following: in order to come within the scope of Directive 79/7, does a person who, in the absence of illness, is working or seeking employment must have given up his or her previous occupational activity owing to the materialization of one of the risks specified in article 3 of the Directive?

[126] CJEU C-48/88, *Achterberg-te Riele and others* [1989], *ECR* 1989, 01963, paragraph 11.
[127] CJEU C-31/90, *Johnson* [1991], *ECR* 1991, I-03723, paragraph 19.

The answer to this question was less restrictive: in order to be a member of the working population within the meaning of Article 2 of the Directive, it is sufficient for the person concerned to be a person seeking employment; no distinction according to the reason for which the person concerned left his/her previous employment or even according to whether or not that person previously carried out an occupational activity is necessary.[128] It is for the national courts to determine whether an individual was actually seeking employment at the time when he or she was affected by one of the risks specified in the Directive. The national court could examine whether that person was registered with an employment organization responsible for dealing with offers of employment or assisting persons seeking employment, whether the person had sent job applications to employers and whether certificates were available from firms stating that the person concerned had attended interviews.[129]

Züchner

In *Züchner*, the Court upheld its case law although it was confronted with a difficult situation. Mr. Züchner, who was previously engaged in an occupational activity, became paraplegic following an accident. As a result of his condition, he required assistance from another person for therapeutic treatment and for general care and home nursing. Mr. Züchner's sickness insurance fund provided financial assistance for the general care and home nursing. Mrs. Züchner applied for such a payment in respect of the therapeutic treatment she provided for her husband. However, as far as the therapeutic treatment is concerned, the sickness insurance fund refused this grant of payment, relying on the provision that “entitlement to home nursing shall arise only where there is no person living in the household who can assist and care for the patient to the extent necessary”. Mrs. Züchner brought her case before the CJEU.

The question however was whether she fell under the personal scope of application as she was not engaged in an occupational activity when her husband suffered his accident. Mrs. Züchner and the Commission argued that she nevertheless formed part of the working population since she provided care for which she had to undergo training and which, by virtue of its nature and scope, can be assimilated to an occupational activity. After all, if she did not provide such care herself, it would have to be provided by someone else against payment or in a hospital.[130]

Although this argument was acceptable, the CJEU repeated that the Directive does not apply to people who are not working, who are not seeking employment or whose occupation or efforts to find work were not interrupted by one of the risks referred to in Article 3 of the Directive. With respect to the term “activity” in relation to the expression “working population”, the Court decided that it only covers an economic activity, being an activity undertaken in return for remuneration in the broad sense. The Court motivated

[128] CJEU C-31/90, *Johnson* [1991], *ECR* 1991, I-03723, paragraph 21.
[129] CJEU C-31/90, *Johnson* [1991], *ECR* 1991, I-03723, paragraph 22.
[130] CJEU C-77/95, *Züchner* [1996], *ECR* 1996, I-05689, paragraph 9.

its decision by the fact that including within the concept of working population a member of a family who, without payment, undertakes an activity which calls for a degree of competence and would otherwise need to be provided by an outsider in return for remuneration, would infinitely extend the scope of the Directive, whereas the purpose of Article 2 is precisely to delimit that scope.[131]

This judgment makes clear that the CJEU does not want to consider housewife's activities as occupational activities falling under art. 2 of the Directive.[132]

Megner and Scheffel

In *Megner and Scheffel*, the question was raised whether persons in minor employment can be considered as part of the working population within the meaning of art. 2 of the Directive. An argument contra was the fact that the small earnings which these persons receive from such employment would not be sufficient to satisfy their needs. The Court did not follow this argument as it found that the fact that a worker's earnings do not cover all his needs cannot prevent him from being a member of the working population.[133]

Although the material scope of application (i.e. the risks covered by art. 3 of the Directive) seems to be of utmost importance for determining whether a person falls within the personal scope, they nevertheless remain two separate tests.[134] This was concluded in *Verholen*.[135] The Court stated that since the Directive precisely determines the persons to whom it applies, a national court may not extend the personal scope to an individual (falling outside the personal scope) on the ground that his/her situation is covered by national rules which fall within the ambit of the material scope of application.[136] This case law was already implicitly present in *Achterberg-te Riele* where the Court stated that a person who is not referred to by Article 2 of Directive 79/7 may not rely on Article 4 of the Directive.[137]

5.1.2.1.1.2 Conclusion: general principles

With respect to the personal scope of application, it is clear that the CJEU pays a lot of attention to the element of employment and the risks listed in art. 3 of the Directive. This

[131] CJEU C-77/95, *Züchner* [1996], *ECR* 1996, I-05689, paragraphs 12-16.
[132] F. PENNINGS, *European Social Security Law*, Antwerp, Intersentia, 2010, 308.
[133] CJEU C-444/93, *Megner and Scheffel* [1995], ECR 1995, I-04741, paragraph 18. See also CJEU C-317/93, *Nolte* [1995], *ECR* 1995, I-04625.
[134] J. NICKLESS & (up-dated by) K. KAPUY, "Equal treatment of men and women" in D. PIETERS, *Reader European and International Social Security Law*, Leuven, 2012-2013, 17.
[135] And later on affirmed in CJEU C-343/92, *De Weerd* [1994], *ECR* 1994, I-00571, paragraph 41.
[136] CJEU C-88/90, *Verholen* [1991], *ECR* 1991, I-03757, paragraphs 19-21.
[137] CJEU C-48/88, *Achterberg-te Riele and others* [1989], *ECR* 1989, 01963, paragraph 17.

puts a high burden upon women who leave the job market in order to take care of their family and housewives, as the Directive does not cover social risks.[138]

This concluding remark can feel rather strange, as social risks are often carried by women and the aim of the Directive is to combat gender discrimination. Instead, it seems to follow a "male oriented model of work".[139]

5.1.2.1.2 Material scope of application

Art. 3 sets out the material scope of the Directive and at the same time it clarifies that the Directive does not cover all forms of employment-related social security. The Directive applies to (a) statutory schemes which provide protection against sickness, invalidity, old age, accidents at work and occupational diseases and unemployment and to (b) social assistance, insofar as it is intended to supplement or replace the schemes referred to in (a). Provisions concerning survivors' benefits and family benefits are not covered (art. 3 (2) Directive 79/7). Initially, the CJEU interpreted the material scope of art. 3 broadly. However, this interpretation was later on narrowed down.

5.1.2.1.2.1 Cases

Drake

In *Drake*, the risk concerned was invalidity. However, the invalid allowance was not paid to protect the recipient against invalidity (Mrs. Drake), but to make up for the loss of income on the part of the recipient who had given up her work to care for an invalid person (Mrs. Drake's mother). Therefore, the benefit was only indirectly linked to invalidity, since the invalid was not the direct recipient of the financial benefit.

However, the CJEU ruled that the payment of this benefit to a person who provides care always depends on the existence of invalidity. Therefore, the CJEU concludes that the fact that a benefit which forms part of a statutory invalidity scheme is paid to a third party and not directly to the disabled person does not place it outside the scope of Directive 79/7.[140]

It is clear that in this case, the CJEU adopted a broad interpretation of art. 3 of the Directive.

[138] J. NICKLESS & (up-dated by) K. KAPUY, "Equal treatment of men and women" in D. PIETERS, *Reader European and International Social Security Law*, Leuven, 2012-2013, 17.
[139] J. NICKLESS & (up-dated by) K. KAPUY, "Equal treatment of men and women" in D. PIETERS, *Reader European and International Social Security Law*, Leuven, 2012-2013, 17.
[140] CJEU C-150/85, *Drake* [1986], *ECR* 1986, 01995, paragraphes 24-26.

Smithson

In *R. v Secretary of State for Social Security (ex parte Smithson)*, the Court needed to decide whether a housing benefit, providing for those whose income is inadequate to cover housing costs, fell under the material scope of the Directive. The criteria in question for calculating the benefit included two of the risks listed in art. 3 of Directive 79/7: age and invalidity.

The CJEU started its judgment by repeating that the mode of payment is not decisive for concluding whether a benefit falls within the scope of Directive 79/7. On the other hand, it is necessary that the benefit is directly and effectively linked to the protection provided against one of the risks specified in art. 3 (1) of the Directive. The Court found that the link between the criteria and the purpose of the benefit was insufficiently strong in order to conclude that the housing benefit intended to protect against the risks of old age and invalidity.[141]

Jackson and Cresswell

In *Jackson and Cresswell*, the CJEU needed to answer the question whether a supplementary allowance or income support, which may be granted in a variety of personal situations to persons whose means are insufficient to meet their needs, fall within the material scope. The Court stated that benefits of social assistance will fall within the scope of the Directive when they aim to provide protection against one of the risks mentioned in art. 3 of Directive 79/7. This implicates that the benefit is directly and effectively linked to the protection provided against one of those risks (repeating *Smithson*).

The Court ruled that art. 3 of Directive 79/7 does not refer to a statutory scheme which, under certain conditions, provides persons with means below a legally defined limit with a special benefit designed to enable them to meet their needs. After all, this would involve the risk of poverty. Therefore, a supplementary allowance or an income support does not fall under the material scope of application of Directive 79/7. This answer does not change when the claimant is suffering from one of the risks listed in art. 3 of the Directive.

In conclusion, the CJEU adds that an exclusion from the material scope of Directive 79/7 is justified *a fortiori* where the law sets the amount of the theoretical needs of the persons concerned, independently of any consideration relating to the existence of any

[141] CJEU C-243/90, *R. v Secretary of State for Social Security (ex parte Smithson)* [1992], *ECR* 1992, I-00467, paragraphs 14-18.

of the risks listed in art. 3 of the Directive.[142] Strangely enough, the CJEU deviated from its case law in a recent case: *Brachner*.

Brachner

In this case, the Court needed to decide whether an annual pension adjustment scheme came into the material scope of the Directive. This subsequent adjustment scheme was designed for individuals whose retirement or survivor's pension is so small that it does not cover the minimum for subsistence. It is clear that this adjustment scheme aims to protect against the risk of poverty by ensuring that they can have the necessary means in the light of their needs. Based on *Jackson and Cresswell,* this would implicate that the compensatory supplement scheme would not fall under the material scope of Directive 79/7.

Nevertheless, the Court brought this benefit under the material scope by underlining that it is clearly, directly and effectively linked to the risk relating to old age. Among others, the Court gave the following two motivations:
(1) The annual pension adjustment scheme is designed to protect persons who have obtained the statutory retirement age against the risk of old age, by ensuring that they can have the necessary means in the light of their needs *as retired* persons.
(2) The increase provided for by the adjustment scheme is granted even to pensioners who do not encounter financial or material hardship. In addition, only those persons who have reached the statutory retirement age may benefit from that adjustment scheme, meaning that the grant of an increase under that scheme is in any case subject to the materialization of the risk of old age.[143]

Richardson

In *Richardson*, the Court found a direct and effective link between the benefit and the protection provided against one of the risks of art. 3 of the Directive. The question was whether a system which exempts certain categories of persons, in particular certain old people, from prescription charges falls within the material scope of the Directive.

The Court ruled that the statutory scheme affords direct and effective protection against the risk of sickness in so far as the grant of the benefit is always conditional on materialization of that risk.[144]

[142] CJEU C-63/91 and C-64/91 (joined cases), *Jackson and Cresswell* [1992], *ECR* 1992, I-04737, paragraphs 17-22.
[143] CJEU C-123/10, *Brachner* [2011], *ECR* 2011, 00000, paragraph 44-53.
[144] CJEU, C-137/94, *R. v Secretary of State for Health (ex parte Richardson)* [1995], *ECR* 1995, I-03407, paragaph 12.

5.1.2.1.2.2 Conclusion: general principles

In sum, the case law of the CJEU stipulates that in order to fall under the material scope of Directive 79/7, a benefit must constitute the whole or part of a statutory scheme providing protection against one of the risks listed in art. 3 of the Directive (or a form of social assistance having the same objective) and the benefit must directly and effectively be linked to the protection against one of those risks.[145]

However, in 2011 the Court did accept a benefit protecting against poverty to fall under the scope of the Directive. In this case, the CJEU underlined the connection of the benefit with one of the risks listed in art. 3 of the Directive (i.e. old age) instead of emphasizing the risk of poverty.

5.1.2.2 Prohibition of discrimination, possible justifications and derogations

5.1.2.2.1 Prohibition of discrimination and possible justifications

Art. 4 (1) of Directive 79/7:

The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly or indirectly by reference in particular to marital or family status, in particular as concerns:

- the scope of the schemes and the conditions of access thereto;
- the obligation to contribute and the calculation of contribution;
- the calculation of benefits including increases due in respect of a spouse and for dependents and the conditions governing the duration and retention of entitlement to benefits.

Clearly, both direct and indirect discrimination are prohibited. The CJEU elaborated on indirect discrimination in *Teuling*.

5.1.2.2.1.1 Cases

Teuling

In this case, the question was whether a system of entitlement to benefits in respect of incapacity for work under which the amount of the benefit is determined in part by marital status and by the income earned from or in connection with work of the spouse or by the

[145] CJEU C-123/10, *Brachner* [2011], *ECR* 2011, 00000, paragraph 40; CJEU 382/98, *Taylor* [1999], *ECR* 1999, I-08955, paragraph 14.

existence of a dependent child constitutes discrimination within the meaning of Article 4 (1) of the Directive.

The Court immediately clarified that the difference in treatment was not explicitly based on gender. However, a system of benefits with supplements, which is not directly based on the sex of the beneficiaries but takes account of their marital status or family situation, and from which it is clear that a considerably smaller proportion of women than of men are entitled to such supplements, is contrary to art. 4 (1) of the Directive if that system of benefits cannot be justified by reasons which exclude discrimination on grounds of sex.

With respect to this justification, the Court decided to look at the purpose of the supplements. It concluded that such a system of benefits with supplements can be justified if the system seeks to ensure an adequate minimum subsistence income for beneficiaries who have a dependent spouse or children, by means of a supplement which compensates for the greater burdens they bear in comparison with single persons.[146]

Later on, the CJEU elaborated the possible justifications of indirect discrimination in *Commission v Belgium* and *Molenbroek*.

Commission v Belgium and Molenbroek

In *Commission v Belgium* the Court described indirect discrimination in a more general way: article 4(1) of Directive 79/7 precludes a less favorable treatment of a social group which consists of a much greater number of persons of one or the other sex, unless the difference in treatment is based on objectively justified factors unrelated to any discrimination on grounds of sex.[147] This definition implicates that it is not enough to show that a national provision particularly disadvantages persons of one sex compared with persons of the other sex. It demands for proof that a substantially higher proportion of members of one sex are being disadvantaged. The use of statistical data is therefore very important.

With respect to the justification, the CJEU decides in both cases that if a Member State can show that the means chosen meet a necessary aim of its social policy and that they are suitable and requisite for attaining that aim, the mere fact that a system of allowances favoring a much greater number of male workers cannot be regarded as an infringement of the principle of equal treatment.[148]

[146] CJEU C-30/85, *Teuling* [1987], *ECR* 1987, 02497, paragraphs 13-19.
[147] CJEU C-229/89, *Commission v. Belgium* [1991], *ECR* 1991, I-02205, paragraph 13.
[148] CJEU C-229/89, *Commission v. Belgium* [1991], *ECR* 1991, I-02205, paragraph 19; CJEU C-226/91, *Molenbroek* [1992] *ECR* 1992 *I*-05943, paragraph 13.

Regarding this social policy the Court acknowledges a reasonable margin of appreciation for each Member State as regards both the nature of the protective measures in the social sphere and the detailed arrangements for their implementation.[149] *Posthuma-van Damme* is a good example of a case where the Court considered this reasonable margin of appreciation.

Posthuma-van Damme

In this case, the question was whether art. 4 of the Directive precludes the application of national legislation which makes the receipt of a benefit for incapacity for work subject to the requirement of having received a certain income from (or in connection with) work in the year preceding the commencement of incapacity. It was an established fact that this requirement affected more women than men.

The Court reaffirmed that Directive 79/7 leaves intact the powers reserved to the Member States to define their social policy and that national measures constituting indirect gender discrimination are prohibited, unless they are based on objective factors unrelated to any discrimination on grounds of sex. The CJEU ruled that guaranteeing the benefit of a minimum income only to persons who were in receipt of income from (or in connection with) work was an appropriate measure to achieve a legitimate aim of social policy.

The Court ended its judgment by underlining that EU law does not prevent Member States from taking measures which have the effect of withdrawing social security benefits from certain categories of persons, provided that those measures are compatible with the principle of equal treatment between men and women as defined in art. 4(1) of Directive 79/7.[150]

A case where the CJEU did not find an objective justification was *Brachner*.[151]

Brachner

The Court clarified that both the fact that women become entitled to a pension at an earlier age than men (with the result that the level of their contributions is generally lower than that of male workers) and the fact that they receive their pension over a longer period because of their longer life expectancy, does not justify a difference in treatment.

[149] CJEU C-229/89, *Commission v. Belgium* [1991], *ECR* 1991, I-02205, paragraph 22; CJEU C-226/91, *Molenbroek* [1992] *ECR* 1992 *I*-05943, paragraph 15.
[150] CJEU C-280/94, *Posthuma-van Damme* [1996], *ECR* 1996, I-00179, paragraphs 24-29.
[151] CJEU C-123/10, *Brachner* [2011], *ECR* 2011, 00000, paragraphs 69-104.

Richards

Finally, in 2006 the Court needed to decide whether art. 4 of Directive 79/7 covers only discrimination based on the fact that an individual is of one or the other sex or also discrimination arising from a gender reassignment of an individual. In this case, national legislation denied a person who had undergone male-to-female gender reassignment an entitlement to a retirement pension on the ground that she had not reached the age of 65, when she would have been entitled to such a pension at the age of 60 if she had been held to be a woman as a matter of national law.

The fact that the prohibition of gender discrimination is one of the fundamental human rights and that the CJEU has the duty to ensure the observance of this rights, led to the conclusion that art. 4 of Directive 79/7 also covers discrimination arising from gender reassignment.[152]

5.1.2.2.1.2 Conclusion: general principles

A differential treatment indirectly based on gender will not constitute an indirect discrimination if (1) the difference is based on objective factors unrelated to any discrimination on grounds of sex, (2) the means chosen meet a necessary aim of social policy and (2) those same means are suitable and requisite for attaining that aim.

Regarding the aims of social policy, the CJEU gives the Member States a large margin of appreciation State, as regards both the nature of the protective measures in the social sphere and the detailed arrangements for their implementation.

Finally, art. 4 of Directive 79/7 does not only cover gender discrimination but also covers discrimination arising from gender reassignment.

5.1.2.2.2 Prohibition of discrimination and possible derogations

Directive 79/7 did not require Member States to immediately constitute equality between men and women in social security. In areas where the establishment of gender equality could result in a serious financial restructuring of the existing statutory schemes, Member States were allowed to only gradually attain equality.

This was enclosed in art. 7 of the Directive which provides for several derogations. In case of a derogation a State may retain direct (!) discriminatory situations, as long as it periodically reexamines these situations in the light of social developments.

[152] CJEU C-423/04, *Richards* [2006], ECR I-03585, paragraphs 20-24.

Art. 7 Directive 79/7:

1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

- The determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;
- Advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;
- The granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife;
- The granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife;
- The consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.

2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.

As the exact scope of these derogations was not clear, this led to a considerable amount of litigation. Especially, the derogation concerning the determination of pensionable age – art. 7 (1) (a) Directive 79/7 – was a point under discussion.

5.1.2.2.2.1 Cases

Equal Opportunities

In *R v Secretary of State for Social Security (ex parte Equal Opportunities Commission)*, the question arose whether the derogation art. 7 (1) (a) of Directive 79/9 merely allows men and women to be treated unequally with respect to the moment at which they become entitled to a pension or whether it also covers other legislative and financial consequences flowing from a different pensionable age, such as the obligation to contribute until reaching that age.

Since the derogation refers to the *determination* of pensionable age for the purpose of granting old-age and retirement pensions, the CJEU found that the provision concerns the moment from which pensions become payable. However, the text does not expressly refer to discrimination in respect of the extent of the obligation to contribute for the purposes of the pension or the amount thereof. The Court therefore decided that such forms of discrimination can only fall within the scope of the derogation if they are necessary in order to achieve the objective which the Directive pursues by allowing Member States to retain a different pensionable age for men and women. This objective

is the progressive implementation of the principle of equal treatment for men and women in matters of social security without disrupting the complex financial equilibrium of pension systems.

Consequently, in a national pension system whose financial equilibrium is based on men contributing for a longer period than women, a different pensionable age for men and women cannot be maintained without altering the existing financial equilibrium, unless such inequality with respect to the length of contribution periods is also maintained.[153]

Van Cant

In *Van Cant*, the Court was asked to answer the question whether articles 4 and 7(1) of the Directive preclude national legislation which authorizes an identical age for male and female workers (to take retirement) from retaining in the method of calculating the pension differently according to sex. This difference for calculating was still linked to the difference in pensionable age which existed under previous legislation.

The Court began its ruling by pointing out that national legislation which prescribes a method of calculating retirement pensions which differs according to a worker's sex is discriminatory. Such form of direct discrimination can only be justified under Article 7(l)(a) of the Directive. However, the CJEU decided that if national legislation has abolished the difference in pensionable age, article 7(1)(a) of the Directive may not be relied on to justify the maintenance of a difference for the calculation of the retirement pension, which is directly linked to the abolished difference in pensionable age.[154]

Consequently, if national legislation maintains a different pensionable age for male and female workers, a Member State is entitled to calculate the amount of pension differently depending on the worker's sex.[155] On the other hand, if a Member State has abolished a different pensionable age for male and female workers, it may not make the calculation of the amount of pension dependent on the worker's sex.

The derogation of art. 7 (1) (a) of the Directive does not only cover different pensionable ages for the purposes of granting old-age and retirement pensions, but also the *possible consequences thereof for other benefits*. Naturally, the CJEU was confronted with questions about the scope of this extension.

[153] CJEU C-9/91, *R v Secretary of State for Social Security (ex parte Equal opportunities Commission)* [1992], *ECR* 1992, I-04297, paragraphs 12-17.
[154] CJEU C-154/92, *Van Cant* [1993], *ECR* 1993, I-03811, paragraphs 11-14.
[155] CJEU C-377/93 to C-384/96 (joined cases), *De Vriendt and others* [1998], *ECR* 1998, paragraph 31; CJEU C-154/96, *Wolfs* [154/96], *ECR* 1998, I-06173, paragraph 30.

Thomas

In *Thomas*, national legislation provided for the grant of a severe disablement allowance to individuals who were incapable of work and an invalid care allowance to individuals who were engaged in caring for a severely disabled person. People who had attained the retirement age, which was 65 for men and 60 for women, were not entitled to those benefits. This legislation led to the following question: when can forms of discrimination provided for in benefit schemes other than old-age and retirement pension schemes be justified, as being a consequence of determining a different retirement age?

First of all, the CJEU affirmed that exceptions to the prohibition of discrimination on grounds of sex need to be interpreted strictly.[156] Subsequently, the Court elucidates that art. 7 (1) (a) of Directive 79/7 allows Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them to adapt progressively their pension systems in that respect without disrupting the complex financial equilibrium of those systems. Finally, the Court decides that forms of discrimination provided for in benefit schemes other than old-age and retirement pension schemes can be justified, as being the consequence of determining a different retirement age according to sex, only if such discrimination is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes.

Although the CJEU decided that it was for the national court to establish whether such objective and necessary link existed in the present case, it nevertheless gave an important guideline: the grant of benefits under non-contributory schemes to persons in respect of whom certain risks have materialized, regardless of the entitlement of such persons to an old-age pension by virtue of contribution periods completed by them, has no direct influence on the financial equilibrium of contributory pension schemes.[157]

Buchner

In this respect, *Buchner* was interesting. In this case? the CJEU was confronted with a system where the grant of early old-age pension on account of incapacity for work was made subject to an age condition which differed according to sex. This difference was made because of reasons of an essentially budgetary nature. The Court made clear that although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of social protection measures, they cannot

[156] See also *Buchner and Others* [2000], *ECR* 2000, I-03625, paragraph 21; CJEU C-303/02, *Haackert* [2004], *ECR* 2004, I-02195, paragraph 26; CJEU C-172/02, *Bourgard* [2004], *ECR* 2004, I-05823, paragraph 28.

[157] CJEU C-328/91, *Thomas* [1993], ECR 1993, I – 01247, paragraphs 8-14. For cases where the Court did found an objective and necessary link, see CJEU C-92/94, *Graham* [1995], *ECR* 1995, I-02521; CJEU C-139/95, *Balestra* [1997], *ECR* 1997, I-00549; CJEU C-196/98, *Hepple* [2000], *ECR* 2000, I-03701.

themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes.[158]

Hepple

In *Hepple* the Court needed to answer whether the Directive prohibits a Member State, which has determined different retirement ages according to sex to introduce further discriminatory measures after the expiry of the period for the transposition of the Directive.

The CJEU made clear that prohibiting a Member State which has set different retirement ages for men and women, from adopting or subsequently amending (after the expiry of the period for transposition of the Directive) measures linked to that age difference would be the same as depriving the derogation of Article 7(1)(a) of its practical effect.[159] Hereafter, the Court repeated its case law on the scope of "possible consequences thereof for other benefits".

5.1.2.2.2.2 Conclusion: general principles

Art. 7 of the Directive provides for several derogations. In case of derogation, a State may retain direct (!) discriminatory situations, as long as it periodically reexamines these situations in the light of social developments.

Especially, the last part of art. 7 (1) (a) of the Directive ("the possible consequences thereof for other benefits"), led to a lot of litigation as the question arose when forms of discrimination provided for in benefit schemes, other than old-age and retirement pension schemes, can be justified, as being a consequence of determining a different retirement age.

The Court has repeatedly stressed that the prohibition of discrimination on grounds of sex needs to be interpreted strictly. Therefore, forms of discrimination provided for in benefit schemes, other than old-age and retirement pension schemes, can only be justified (as being the consequence of determining a different retirement age according to sex) if such discrimination is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes.

It is for the national courts to determine whether such a necessary and objective link is present. However, the CJEU has given two important guidelines. First of all, the grant of benefits under non-contributory schemes to persons in respect of whom certain risks have materialized, regardless of the entitlement of such persons to an old-age pension by virtue of contribution periods completed by them, has no direct influence on the

[158] CJEU C-104/98, *Buchner and Others* [2000], *ECR* 2000, I-03625, paragraph 28.
[159] CJEU C-196/98, *Hepple* [2000], *ECR* 2000, I-03701, 21-24.

financial equilibrium of contributory pension schemes. Secondly, although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of social protection measures, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes.

The CJEU has also clarified that a Member States who has set different retirement ages for men and women may adopt or subsequently amend (even after the expiry of the period for transposition of the Directive) measures linked to the established age difference. Not allowing this to the Member States would deprive the derogation of Article 7(1) (a) of its practical effect.

In conclusion, we can say that questions concerning the scope of the derogation in art. 7 (1) (a) of the Directive keep on rising. See for example the reference for a preliminary ruling made on 22 December 2011. Again, the question is asked whether a differential treatment on the basis of gender under an incapacity benefit scheme is necessarily and objectively linked to the difference in pensionable age so that it falls within the scope of the derogation under Article 7(l) (a) of Directive 79/7.[160]

5.1.2.2.2.3 The viability of article 7 (1) Directive 79/7

Due to a rather recent judgment of the CJEU, some authors start to doubt whether the derogations of art. 7 of the Directive are still acceptable under current EU law. It concerns the *Test-Achats* case of March 2011.

5.1.2.2.2.3.1 Test-Achats case

The CJEU was asked whether Article 5(2) of Directive 2004/113 on implementing the principle of equal treatment between men and women in the access to and supply of goods and services was valid in the light of the principle of equal treatment for men and women.

Article 5 of Directive 2004/113:

1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where

[160] CJEU C-680/11, Reference for a preliminary ruling from Upper Tribunal (United Kingdom) made on 22 December 2011 — Anita Chieza v Secretary of State for Work and Pensions**,** *OJ* C 65, 3.3.2012.

the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

The Court starts its opinion by underlining that article 6(2) of the TEU claims that the EU respects fundamental rights as incorporated in the Charter of fundamental rights of the EU. Articles 21 and 23 of the Charter stipulate that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas. Since recital 4 to Directive 2004/113 expressly refers to these two articles, the Court decides that the validity of Article 5(2) must be assessed in the light of those provisions.[161]

In the progressive achievement of equality, it is the EU legislature which determines when action will be taken in the light of the development of economic and social conditions within the EU. However, when such action is decided upon, it must contribute, in a coherent manner, to the achievement of the intended objective, without prejudice to the possibility of providing for transitional periods or derogations of limited scope. In casu, as the use of actuarial factors related to sex was widespread in the provisions of insurance services at the time when the directive was adopted, it was acceptable to implement the principle of equality for men and women – more specifically, the application of the rule of unisex premiums and benefits – only gradually by means of appropriate transitional periods.

This was provided in art. 5 (1) of Directive 2004/113: the differences in premiums and benefits arising from the use of sex as a factor in the calculation thereof needed to be abolished by 21 December 2007 at the latest. However, art. 5 (1) of the Directive was only a general rule and art. 5 (2) of the Directive provided for certain Member States the option of deciding before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data. As this derogation lacks a clear and well-delineated time span, Member States who had used this option were permitted to allow insurers to apply the unequal treatment without any temporal limitation.[162]

The CJEU continues its opinion by repeating that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively

[161] CJEU C-236/09, *Test-Achats* [2011], *ECR* 2011, 00000, paragraphs 16-17.
[162] CJEU C-236/09, *Test-Achats* [2011], *ECR* 2011, 00000, paragraphs 20-26.

justified. The comparability of situations must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question.

In this case, the Court decides that the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.[163] Advocate General KOKOTT elaborated on this comparability: "the life expectancy of insured persons, which is of particular interest in the present case, is strongly influenced by economic and social conditions as well as by the habits of each individual (for example, the kind and extent of the professional activity carried out, the family and social environment, eating habits, consumption of stimulants (45) and/or drugs, leisure activities and sporting activities). In view of social change and the accompanying loss of meaning of traditional role models, the effects of behavioral factors on a person's health and life expectancy can no longer clearly be linked with his sex. To refer once again to a few of the examples just mentioned: both women and men nowadays engage in demanding and sometimes extremely stressful professional activities, members of both sexes consume a not inconsiderable amount of stimulants and even the kind and extent of sporting activities practiced by people cannot from the outset be linked to one or other of the sexes. […] The use of a person's sex as a kind of substitute criterion for other distinguishing features is incompatible with the principle of equal treatment for men and women. It is not possible in that way to ensure that different insurance premiums and benefits for male and female insured persons are based exclusively on objective criteria which have nothing to do with discrimination on grounds of sex."[164]

Due to all these considerations, the CJEU claims that art. 5 (2) of Directive 2004/113, which enables certain Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113. Therefore, the provision is incompatible with Articles 21 and 23 of the Charter.[165] It must be stressed that not derogation itself, but the lack of a temporal limitation led to the invalidation of art. 5 (2) Directive 2004/113.[166]

5.1.2.2.2.3.2 The effect of *Test-Achats* on article 7 Directive 79/7

Although the *Test-Achats* case concerned private insurance, authors have nevertheless drawn interesting conclusions from this case with respect to the use of derogations in EU social policy legislation on equality and more specifically the use of derogations provided

[163] CJEU C-236/09, *Test-Achats* [2011], *ECR* 2011, 00000, paragraphs 28-30.
[164] Adv. Gen. KOKOTT, opinion on *Test-Achats* [C-236/09], *ECR* 2011, 00000, paragraphs 62, 63 and 67. It is interesting to compare this opinion with the opinion of Advocate General Van Gerven in the Neath case. Both opinions are quite similar: Adv. Gen. VAN GERVEN, joined opinion on *Ten Oever* (C-109/91), *Moroni* (C- 110/91), *Neath* (152/91), *Coloroll Pension Trustees* (C-200/91), *ECR* 1993, I-04879, paragraph 36.
[165] CJEU C-236/09, *Test-Achats* [2011], *ECR* 2011, 00000, paragraphs 31-43.
[166] E. CARACCIOLO DI TORELLA, "Gender equality after Test Achats, *Journal of the Academy of European Law* 2012, 64; C. TOBLER, "C-236/09, Association belge des Consommateurs Test-Achats ABSL v Conseil des ministres"*, Common Market Law Review* 2011, 2056.

by Directive 79/7.[167] In this case, the CJEU seems to stress that direct discrimination can only be a (very) rare exception to the principle of equality.[168] This view does not agree with the contemporary EU social policy legislation, which provides for several exceptions to the principle of equal treatment, such as art. 7 (1) Directive 79/7, which explicitly allows certain forms of direct discrimination. The one bright spot could be that the *Test Achats* judgment does not convict the existence of derogations to the principle of equality. It only opposes against the lack of a temporal limitation for the use of those derogations.

Despite this subtle distinction, the existence of art. 7 (1) of Directive 79/7 – and other provisions of EU social policy legislation, such as art. 4 of the Race Directive – remains problematic. Since art. 7 (1) of Directive 79/7 does not provide for any time limitation, it does not only give Member States the possibility to provide for derogations in an indefinite way, but it can also give rise to a situation where some Member States have adopted derogations whereas others have not.[169] It is clear that CJEU's judgment in *Test-Achats* opposes this possibility. Although the Commission presented a proposal for a Council Directive to remove the derogations of art. 7 (1), this Directive was never adopted.[170] We can therefore conclude two things: (1) the combination of the judgment of *Test-Achats* and the fact that art. 7 (1) of Directive 79/7 still exists in its original phrasing, could result in a question to the CJEU about the validity of art. 7 (1) Directive 79/7. (2) If the CJEU would be confronted with this question, it is plausible that the Court decides on the invalidity of art. 7 (1) of the Directive (in the light of its *Test-Achats* judgment).

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[167] P. WATSON, "Equality, fundamental rights and the limits of legislative discretion: comment on Test-Achats, *European Law Review* 2011, 896-904; E. CARACCIOLO DI TORELLA, "Gender equality after Test Achats, *Journal of the Academy of European Law* 2012, 59-69; F. TEMMING, "Case Note – ECJ finally paves the way for unisex premiums and benefits in insurance and related financial service contracts", *German Law Journal* 2012, 105-123; P. WATSON, "Equality, fundamental rights and the limits of legislative discretion: comment on Test-Achats, *European Law Review* 2011, 896-904.

[168] F. TEMMING, "Case Note – ECJ finally paves the way for unisex premiums and benefits in insurance and related financial service contracts", *German Law Journal* 2012, 113 and 114; E. CARACCIOLO DI TORELLA, "Gender equality after Test Achats, *Journal of the Academy of European Law* 2012, 66.

[169] P. WATSON, "Equality, fundamental rights and the limits of legislative discretion: comment on Test-Achats, *European Law Review* 2011, 903.

[170] EUROPEAN COMMISSION, Proposal for a Council Directive completing the implementation of the principle of equal treatment for men and women in statutory social security and occupational social security, COM(87) 494 final, *OJ* 1987, C 309, 10-13. The preamble mentioned that it was appropriate to implement the principle of equal treatment in areas where the application of Directive 79/7 is or may be excluded or deferred, in order to achieve total elimination of discrimination on grounds of sex in respect of social security. This aim was pursued by the deletion of art. 7 (1) paragraphs (a) to (d). However, "this proposal was first put on ice and next, it silently disappeared from the agenda." See: EUROPEAN COMMISSION, *Report by the Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women*, 2007, http://ec.europa.eu/justice/gender-equality/files/2007-_social_security_en.pdf , 5.

In order to conclude this section, we also want make to a remark which we will elaborate further on. The *Test Achats* judgment is also inspired by an underlying view on the concept of equality. After all, the CJEU has a fundamental problem with a *"group concept of equality"* which is among others being used by insurance companies: as women have a longer life expectancy, the life insurance of every female will be more expensive than the same insurance for a male insured person.[171] The CJEU rejects such group based distinctions and defends an individualistic approach of equality: every person needs to be treated according to its individualistic characteristics and not because of his/her membership to a certain group.[172] This preference for an individualistic approach became clear in the Court's case law on positive action in the area of gender discrimination and employment. This case law will be discussed in detail below.

5.1.3 Discrimination based on race

The creation of Directive 2000/43 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive) was made possible by the implementation of art. 19 TFEU. The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect the principle of equal treatment in the Member States.

Art. 2 (1) of the Race Directive

For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

5.1.3.1 Scope of application

Art. 3, paragraph 3 states that Directive shall apply to all persons. Consideration 16 of the Preamble affirms this large personal scope of application as it stresses the necessity to protect all natural persons. At the level of the EU, this large scope of application was considered to be disturbing in the light of national measures disadvantaging third country nationals compared with EU nationals.[173] This concern was dealt with in art. 3 (2) of the Directive and was clarified in consideration 12: "This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment

[171] E. CARACCIOLO DI TORELLA, "Gender equality after Test Achats, *Journal of the Academy of European Law* 2012, 60.
[172] F. TEMMING, "Case Note – ECJ finally paves the way for unisex premiums and benefits in insurance and related financial service contracts", *German Law Journal* 2012, 120; E. CARACCIOLO DI TORELLA, "Gender equality after Test Achats, *Journal of the Academy of European Law* 2012, 60.
[173] M. BELL, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, 77.

based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation".

Art. 3 of the Race Directive explicitly states that social protection, including social security and health care, and social advantages fall under the scope of the Directive. Recital 12 explains that including the area of social security (among other areas) is necessary to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin not only in the area of employment, but also in other areas.

The exact meaning of "social protection" is still rather unclear. However, it is likely that this concept will cover "any form of benefit offered by the State whether economic or in kind", which is not covered by the concept "social security".[174]

5.1.3.2 Prohibition of discrimination and possible justifications

Art. 2 does not only prohibit direct or indirect discrimination based on racial or ethnic origin, it also defines these concepts. On top of it, the Directive clarifies that sexual harassment and the instruction to discriminate against persons shall also be deemed to be discrimination (art. 2 (3) and (4) of the Directive).

Direct discrimination "shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin". Art. 4 of the Directive provides for a derogation to this prohibition of direct discrimination: Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination when such a characteristic constitutes a *genuine and determining occupational requirement* (by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out) provided that the objective is legitimate and the requirement is proportionate. In this case, a difference in treatment will not be considered a direct discrimination.[175] Please note that due to the *Test Achats* case, this permission of providing for a difference in treatment could be undermined.

Indirect discrimination "shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are

[174] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS and COUNCIL OF EUROPE, *Handbook on European non-discrimination Law*, Luxembourg, Publications Office of the European Union, 2011, 67.
[175] EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 34.

appropriate and necessary". As this definition only asks for proof of a particular disadvantage *compared with other persons* and not for proof that a *substantially higher proportion* of members of one ethnic or racial group is being disadvantaged, the use of statistical data to prove indirect discrimination is not necessary.[176] It is sufficient to show that an apparently neutral provision puts persons of a specific racial or ethnic group in a disadvantaged position compared to others. This leaves a margin of appreciation to courts and legislators.[177] It is interesting to see that the definition of indirect discrimination immediately provides for the possibility of justifying such kind of discrimination when the difference in treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

5.1.3.3 Positive action

The Race Directive explicitly allows Member State to take positive action.

Art. 4 of the Race Directive:

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

The phrasing "shall not prevent any Member State" clearly underlines the optional nature of taking such kind of positive measures.[178] Positive action measures could focus for example on ensuring that certain racial or ethnic groups are fully informed about job advertisements, including publishing adverts in publications targeting these groups.[179] The explicit introduction of the concept of positive action is a quantum leap in the development of EU anti-discrimination law. After all, before the Race Directive, the CJEU could only address positive action measures in the light of gender discrimination and employment (see art. 157 (4) and art. 2 (4) Directive 76/207).[180]

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[176] Compare with the definition of indirect discrimination in the light of Directive 79/7; M. BELL, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, 75; L. WADDINGTON & M. BELL, "More equal than others: Distinguishing European Union Equality Directives", *Common Market Law Review* 2001, 539; D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 333.

[177] D. SCHIEK, "A New Framework on Equal Treatment of Persons in EC Law?"*, European Law Journal* 2002, 296.

[178] EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 28.

[179] EUROPEAN COMMISSION, Report form the Commission to the Council and the European Parliament. The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(2006) 643 final, 7.

[180] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 332.

The CJEU has not yet interpreted art. 4 of the Directive. Therefore, it is unclear (1) which conditions a positive action must satisfy and (2) how such actions can be reconciled with the principle of equal treatment. Nevertheless, the Court has already an elaborated jurisprudence concerning positive action in the area of gender discrimination and the area of employment. Most authors believe that the CJEU will use this jurisprudence as a starting point for cases concerning positive action as set forth in the Race Directive.[181] Consequently, we will discuss the CJEU's case law on positive action in the areas of gender discrimination and employment.

Although it is likely that the CJEU will use this case law as a starting point for interpreting "positive action" under the Race Directive, this does not imply that the point of arrival will also be similar.[182] This thought can be motivated in a twofold way. First of all, the scope of the Race Directive is much broader than the area of gender discrimination and employment.[183] Will the Court use the interpretation of positive action in the field of employment also in the exact same way in the field of e.g. social security or education? Secondly, the CJEU can decide that different social contexts may result in different forms of protection, which would again result in a change in the scope for positive action.[184] The EU itself has already done this in the General Framework Directive: the second paragraph of the article on positive action provides for an additional protection for disabled persons.[185]

We will first shortly discuss the relevant cases. Afterwards, we will concentrate on the effects of the rulings of the Court.

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[181] EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 31; L. WADDINGTON & M. BELL, "More equal than others: Distinguishing European Union Equality Directives", *Common Market Law Review* 2001, 602; D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 333; D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 349.

[182] EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 31.

[183] M. BELL, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, 78.

[184] EUROPEAN COMMISSION (report drafted by L. WADDINGTON & A. LAWSON), *Disability and non-discriminationin the European* Union, Luxembourg, Publications Office of the European Union, 2009, 36; L. WADDINGTON & M. BELL, "More equal than others: Distinguishing European Union Equality Directives", *Common Market Law Review* 2001, 603.

[185] Art. 7 (2) Directive 2000/78: *"With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment."*

5.1.3.3.1 Cases

Case law dealing with the concept of positive action in the field of gender discrimination and the area of employment and occupation focuses most of the time on art. 2 (4) Directive 76/207 and art. 157(4) TFEU.[186] In these cases, the CJEU does not start its reasoning by elaborating on the concept of positive action itself. Instead, it repeats the basic principle that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly.[187]

It follows that a difference in treatment based on gender in principle constitutes discrimination and is therefore legally unacceptable.[188] Nevertheless, this difference in treatment will not be discriminatory if it can be considered as positive action under Directive 76/207 or art. 157 (4) TFEU. Such positive action measures "*although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of equality which may exist in the reality of social life"*.[189] However, positive action remains a derogation to an individual right laid down in EU legislation, i.e. the principle of equal treatment. Therefore positive action – derogating from such individual right – needs to be interpreted strictly.[190] This strict interpretation was adopted in *Kalanke*.

Kalanke

In the *Kalanke* case, the Court concluded that a positive action measure giving the under-represented sex absolute and unconditional priority goes beyond the derogation allowed under the concept of positive action.[191]

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[186] Art. 157 (4) TFEU: *"With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."* and art. 2 (4) of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions: *"This directives shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1."*

[187] CJEU C-450/93, *Kalanke* [1995], *ECR* I-3051, paragraph 15; CJEU C-409/95, *Marshall* [1997], *ECR* 1997, I-06363, paragraph 21.

[188] CJEU C-450/93, *Kalanke* [1995], *ECR* I-3051, paragraph 16.

[189] CJEU C-312/86, *Commission* v France [1988], *ECR* 1988, 06315, Paragraph 15.

[190] CJEU C-222/84, *Johnston* [1986], *ECR* 1986, 01651, paragraph 36; CJEU C-450/93, *Kalanke* [1995], *ECR* I-3051, paragraph 21.

[191] In his opinion on the *Kalanka* case, Advocate General TESAURO also argued that positive measures have an implicit temporal nature. This implies that the legitimacy of such measures will also depend on the continuation of the obstacles which need to be removed.[191]
CJEU C-450/93, *Kalanke* [1995], *ECR* I-3051, paragraph 22; CJEU C-409/95, *Marshall* [1997], *ECR* 1997, I-06363, paragraph 32.

In this case, a general measure gave automatic preference to women for appointment when they were equally qualified and applied for a job in sectors in which they were under-represented. The CJEU stated that positive action measures are a derogation to the individual right of non-discrimination and every derogation to an individual right needs to be interpreted strictly. The Court concluded that such preferential treatment of the under-represented sex was not justifiable under the concept of positive action.[192]

Marshall

In *Marshall*, the Court adjusted its jurisprudence. In this case, a national measure gave priority to hire women when they were equally qualified unless reasons specific to an individual male candidate tilt the balance in his favor. The Court accepted this preferential treatment to women by stressing its conditionality: priority can be given to the under-represented sex (1) if they are equally qualified and (2) if in each individual case the candidatures are subjected to an objective assessment which takes into account the specific personal qualities of all candidates (*saving clause*).[193]

In other words, preferential treatment must always be attached to "objective tailored criteria" and these criteria may not discriminate one gender.[194] This jurisprudence was confirmed in *Badeck*, in which a national measure established a "system of flexible result quotas" which gave preference to women when they were equally qualified.[195] The system in question provided for several saving clauses.

Abrahammson

In *Abrahammson*, a national measure gave preference to members of the under-represented sex for the grant of a post at universities and higher educational institutions (over an applicant of the opposite sex who would otherwise have been selected) when they had sufficient qualifications for the post and under the conditions that the difference between the qualifications is not so great as to give rise to a breach of the requirement of objectivity in granting the posts.

Firstly, the Court repeated its jurisprudence: preferential treatment can only be accepted when the members of the under-represented sex and members of the opposite sex are

[192] CJEU C-450/93, *Kalanke* [1995], *ECR* I-3051, paragraph 21-22; S. PRECHAL, "Case C-450/93, Kalanke v Freie Hansestadt Bremen", *Common Market Law Review* 1996, 1255.
[193] CJEU C-409/95, *Marshall* [1997], *ECR* 1997, I-06363, paragraph 33. Later on affirmed in CJEU C- 158/97, *Badeck and Others* [2000], *ECR* I-1875, paragraph 38; CJEU C-407/98, *Abrahamsson and Anderson* [2000] *ECR* I-5539, paragraph 61.
[194] CJEU C-409/95, *Marshall* [1997], *ECR* 1997, I-06363, paragraph 33; EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 21.
[195] CJEU C-158/97, *Badeck and Others* [2000], *ECR* I-1875; D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 341.

equally qualified and saving clauses are provided. The Court continued by stating that the assessment of the qualifications of the individuals must be based on clear and unambiguous criteria.[196] As the Court found that no such criteria were present, it ruled that the national measure was not permissible under the positive action provision of Directive 76/207.

As the national measure was in violation with the Directive, the CJEU found it necessary to investigate if the measure would perhaps be permissible under article 157 (4) TFEU. However, the Court made it clear that "*even though Article 141(4) EC allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued*".[197]

Lommers

In *Lommers*, the CJEU elaborated on the principle of proportionality. It became clear that using this principle would lead to a more comprehensive test, instead of its former case-by-case approach (cf. the objective assessment which takes into account the specific personal qualities).[198] The case concerned rules of an employer under which subsidized nursery places are made available only to female employees save where, in the case of a male employee, an emergency situation, to be determined by the employer, arises.

In this case, the Court repeated that a positive action measure concerns a derogation from the individual right of equal treatment. In order to determine if such derogation can be accepted, the derogation needs to answer to the principle of proportionality. This requires that the derogation must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.[199] As the Court found that this was not the case, it was not necessary to investigate the compliance of the measure with art. 157 (4) TFEU.

Bricheche

Finally, in *Bricheche*, the Court needed to judge a national provision which reserved the exemption from the age limit for obtaining access to public-sector employment to widows

[196] CJEU C-407/98, *Abrahamsson and Anderson* [2000] *ECR* I-5539, paragraph 50.
[197] CJEU C-407/98, *Abrahamsson and Anderson* [2000] *ECR* I-5539, paragraph 50.
[198] EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 21.
[199] CJEU C-476/99, *Lommers* [2002], *ECR* 2002, I-02891, paragraph 39.

who had not remarried who were obliged to work, excluding widowers who had not remarried who were in the same situation.[200]

Based on its case law from the foregoing cases the CJEU decided that the national provision was not permissible under the positive action provision of Directive 76/207.[201] The Court continued to investigate if the measure would perhaps be permissible under article 157 (4) TFEU. However, after the elaboration on the principle of proportionality in *Lommers* this test of compliance with art. 157 (4) TFEU became purely theoretical. After all, if the derogation does not remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment is not reconciled as far as possible with the requirements of the aim thus pursued (*Lommers* regarding the positive action measure under Directive 76/207), it is highly unlikely that the measure would stand the test of art. 157 (4) TFEU, namely that the positive action measure may not be disproportionate to the aim pursued (*Abrahammson).*

5.1.3.3.2 Conclusion: general principles

In *Briheche* we can find a clear description of the CJEU's case law on positive action measures in the area of gender discrimination and the area of employment and occupation:

"A measure which is intended to give priority in promotion to women in sectors of the public service must be regarded as compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates. Those conditions are guided by the fact that, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued."[202]

This case law of the Court is often criticized for two reasons. On the one hand, it only demands "equality of opportunities" and not "equality of results". On the other hand, it seems to reject "group based positive action".

5.1.3.3.2.1 Equality of opportunities

[200] CJEU C-319/03 *Briheche* [2004] *ECR* 2004, I-8807.
[201] CJEU C-319/03 *Briheche* [2004] *ECR* 2004, I-8807, paragraph 28.
[202] CJEU C-319/03 *Briheche* [2004] *ECR* 2004, I-8807, paragraph 24.

"Positive action aims at leveling the field for all players. It favors traditionally discriminated categories of individuals by allowing them to compete on an equal footing, but it does not promise them victory."[203]

In *Commission v France* (1988), the CJEU clearly referred to positive action as a way to establish substantive equality, as the Court described positive action measures as "*although discriminatory in appearance, in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life"*.[204] However, when testing if positive measures are acceptable under EU law, the Court only accepts measures creating equal *"opportunities of access to employment and careers"*.[205] This is a consequence of a restrictive interpretation of the articles providing for the possibility of positive action in the area of employment law. For example: art. 2 (4) of Directive 76/207 states: *"This directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1"*.

This restrictive interpretation is affirmed by Advocate General TESAURO, who states that art. 2 (4) of the Directive does allow Member States to take positive actions, but *"only to the extent to which those actions are designed to promote and achieve equal opportunities for men and women, in particular by removing the existing inequalities which affect women's opportunities in the field of employment"*.[206] Consequently, positive action measures which create equal results through automatic mechanisms are not accepted.[207] This means that the vital stage at which equality counts is the starting point and not the point of arrival.[208] Positive action measures – in the light of art. 2 (4) Directive 76/207 – may establish an actual situation where both sexes have equal opportunities to pursue the same results. However, those measures may not grant the results directly on or grant priority to the under-represented sex simply because they are under-represented.[209] Some authors do not agree with the Advocate General and state that the phrasing "to ensure full equality in practice" in fact urges Member States to take result-oriented positive measures.[210]

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[203] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 342.
[204] CJEU C-312/86, *Commission* v France [1988], *ECR* 1988, 06315, Paragraph 15.
[205] CJEU C-476/99, *Lommers* [2002], *ECR* 2002, I-02891, paragraph 33.
[206] Adv. Gen. TESAURO, opinion on *Kalanke* [450/93], *ECR* 1995, I-03051, paragraph 12.
[207] L. WADDINGTON & M. BELL, "More equal than others: Distinguishing European Union Equality Directives", *Common Market Law Review* 2001, 601.
[208] Adv. Gen. LA PERGOLA, joined opinion on *Gerster* [C-1/95] and *Kording* [100/95], *ECR* 1996, I-05253, paragraph 40; Adv. Gen. TESAURO, opinion on *Kalanke* [450/93], *ECR* 1995, I-03051, paragraph 13 and 19.
[209] Adv. Gen. TESAURO, opinion on *Kalanke* [450/93], *ECR* 1995, I-03051, paragraph 12. 21-22.
[210] D. SCHIEK, "Positive Action before the European Court of Justice – New Conceptions of Equality in Community Law? From *Kalanke* and *Marschall* to *Badeck*,"*, International Journal of Comparative Labour Law and Industrial Relations,* 2000, 265.; Adv. Gen. SAGGIO, opinion on *Badeck* [C-158/97], *ECR* 2000, I-01875, paragraph 27.

We can say that the Court has slightly adapted its ruling on "equality of opportunities" versus "equality of results" in the *Marshall* case. In this case a national measure gave priority to hiring women when they were equally qualified unless reasons specific to an individual male candidate tilt the balance in his favor. As the Court accepted this national measure, it accepted a preference of hiring women, which can be considered a matter of "results".[211] However, this acceptance of equality of results still depends on the fulfillment of two conditions: (1) women are equally qualified and (2) a saving clause.[212]

In conclusion, we want to point out that although art. 2 (4) Directive 76/207 and art. 157 (4) TFEU phrase the principle of positive action in a different way, the CJEU does not apply a different level of scrutiny.[213] This is regrettable, as art. 157 (4) seems to give Member States a broader discretion for adopting positive measures.[214] This broader discretion results from the fact that the article does not only permit measures which reduce inequalities, but also measures which compensate for past or existing inequalities.[215] The fact that the CJEU uses the same interpretation for both provisions was clearly shown in *Briheche*, where the Court investigated the compliance of a positive action measure both with Directive 76/207 and art. 157 (4) TFEU. For the compliance test the CJEU used almost the exact same criteria for both provisions. Here, no reference to the different wording of the two provisions was made.

With respect to the Race Directive, we can take two conclusions. On the hand, it would have been interesting if the CJEU had used a different level of scrutiny for art. 157(1) TFEU, as the Race Directive also allows measures to "prevent or compensate for disadvantages" linked to racial or ethnic origin.

On the other hand, the debate about the "equal opportunities" approach of the Court seems of less importance for the Race Directive, as it describes positive measures in a much broader way: "*with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin"*.

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[211] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 341.
[212] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 341.
[213] L. WADDINGTON & M. BELL, "More equal than others: Distinguishing European Union Equality Directives", *Common Market Law Review* 2001, 601; D. SCHIEK, "Positive Action before the European Court of Justice – New Conceptions of Equality in Community Law? From *Kalanke* and *Marschall* to *Badeck*,"*, International Journal of Comparative Labour Law and Industrial Relations,* 2000, 273; EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 22-23.
[214] Adv. Gen. POIARES MADURO, opinion on *Briheche* [C-319/03], ECR 2004, I-08807, paragraph 48.
[215] Adv. Gen. POIARES MADURO, opinion on *Briheche* [C-319/03], ECR 2004, I-08807, paragraph 48.

5.1.3.3.2.2 Group based positive action: a cold reception by the CJEU

The case law of the CJEU on positive action in the area of gender discrimination and employment has evolved over time. Nevertheless, the case law keeps on proclaiming a very individualistic approach.[216] This involves negative consequences for group based positive action, i.e. a preferential treatment of individuals because of their membership to a specific disadvantaged group.

Kalanke

In *Kalanke*, the preferential treatment was completely detached from any demonstrable inequality.[217] The Court ruled that a positive action measure giving the under-represented sex such an absolute and unconditional priority goes beyond the derogation allowed under the concept of positive action.[218] After all, an automatic and unconditional preference of the under-represented sex (*group* entitlements) would infringe the *individual* right to non-discrimination of individuals of the opposite sex.[219]

This decision of the CJEU could have been predicted when looking at the opinion of Advocate General VAN GERVEN on the *Neath* case in 1993. The case concerned a private occupational pension scheme allowing retired individuals to collect all their pension benefits at the time of their retirement. However, as women normally live longer than men, the amount of benefits was less for men than for women. The question was *"whether discrimination, within the meaning of art. 119* (now art. 157 TFEU), *exists when men and women are treated, not as individuals, but as a group and unequal treatment for individual men or women arises as a result*.[220]

The answer of the Advocate General was affirmative: *The unequal treatment of men and women may be justified, and therefore not constitute unlawful discrimination, if the difference in treatment is based on objective differences which are relevant, that is to say which bear an actual connection with the subject of the rules entailing unequal treatment. In this regard, I could for instance imagine that factors having a direct impact on the life expectancy of a specific individual, such as risks associated with a particular occupation, smoking, eating and drinking habits and so forth, would be taken into account, if this is technically possible, in order to justify individual differences in contributions and/or benefits. As regards differences in average life expectancy between*

[216] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 334.
[217] EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 20.
[218] CJEU C-450/93, *Kalanke* [1995], *ECR* I-3051, paragraph 22; CJEU C-409/95, *Marshall* [1997], *ECR* 1997, I-06363, paragraph 32.
[219] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 339.
[220] Paragraph 35.

men and women, the situation is different, however. These differences bear no relation to the life expectancy of a specific individual and are thus irrelevant for the calculation of the contributions and/or benefits which may be ascribed to that individual.[221]

This opinion implies that the principle of equality between men and women only concerns individual entitlements and does not grant any collective rights.[222]

Marshall

In *Marshall* the Court slightly adapted its severe judgment of *Kalanke* by replacing the individualistic approach by a more group based approach. This new approach allowed the justification of individual positive action measures on the basis of group inequality.[223] However, two conditions needed to be fulfilled: (1) the member of the under-represented sex is equally qualified and (2) in each case the candidatures are subjected to an objective assessment which takes into account the specific personal qualities of all candidates (*saving clause*).

In theory, this case made group based positive action with preferential treatment possible. However, the conditions imposed by the Court are also making such positive action rather illusory. For example, preferential treatment can only be possible if the member of the under-represented sex is equally qualified.[224]

Lommers and Bricheche

In *Lommers*, the CJEU has left its case-by-case approach from *Marshall* for a more comprehensive proportionality test.[225] This test requires that a positive action measure remains within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment is reconciled as far as possible with the requirements of the aim thus pursued.[226]

Finally, in *Briheche*, the Court finalized its case law by connecting the conditions from *Marshall* to the proportionality test from *Lommers*: *"A measure which is intended to give*

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[221] Adv. Gen. VAN GERVEN, joined opinion on *Ten Oever* (C-109/91), *Moroni* (C- 110/91), *Neath* (152/91), *Coloroll Pension Trustees* (C-200/91), *ECR* 1993, I-04879, paragraph 36.
[222] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives, working paper 10/02, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=437202, 13.
[223] EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 20.
[224] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 344.
[225] EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 21.
[226] CJEU C-476/99, *Lommers* [2002], *ECR* 2002, I-02891, paragraph 39.

priority in promotion to women in sectors of the public service must be regarded as compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates. Those conditions are guided by the fact that, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued".[227]

This short repetition of the Court's case law clearly shows that CJEU does not go easy on group based positive action with automatic and preferential treatment. This aversion of group based entitlements and the emphasis on individual rights result from the two following observations. First of all, from the beginning on EU law has been reluctant in granting group rights and group entitlements because of the atrocities of the Holocaust are still fresh in everyone's mind.[228] Secondly, and from a more economic perspective, the emphasis on the protection of market freedom for all individuals blocked the road for groups or group justice, as in a free market only individuals could have rights.[229]

It should not be a surprise that the CJEU's case law is heavily criticized by authors. Some of these authors try to skirt the case law of the CJEU by interpreting the concept of positive action in another way. We can find an example with CARUSO: *"Positive action, both in soft and hard modes, can be conceived of as one among many existing forms of allocations of resources in favor of identity-defined groups, legitimized by the political consensus of the relevant constituency, rather than as an exceptional derogation from the canon of individual equality and blind justice"*.[230] This interpretation of the concept stresses the possibility of the redistribution of sources to identity-defined groups.[231] According to this author, such targeting identity-defined groups is already common in a lot of Member States for the distribution of some social benefits (e.g. housing, education).[232] In the light of this interpretation, a Member State, while sovereignly exercising its redistributive functions, may decide to grant benefits to identity-based

[227] CJEU C-319/03 *Briheche* [2004] *ECR* 2004, I-8807, paragraph 23-24.
[228] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 353.
[229] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 355.
[230] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 335.
[231] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 362.
[232] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 364.

groups, when this seems appropriate and legitimate.[233] As this concerns a regulatory choice of the Member State, the CJEU should not interfere in this decision. After all, the Member States still maintain most regulatory powers in social matters.[234]

To conclude, we can state that group based positive action with an automatic and unconditional preferential treatment is not possible under current EU case law. In order to give priority to members of a specific group, several conditions need to be fulfilled. Although many authors contest this case law, the CJEU has not yet changed its opinion in the area of gender discrimination and the area of employment. Moreover, it has even affirmed this individualistic approach of gender equality in the area of insurance (see *Test Achats* case).

However, a change in judgment could occur when the CJEU is confronted with the concept of positive action and the area of racial discrimination. As earlier mentioned, the Court can decide that different social contexts may result in different forms of protection, which can result in another view on positive action in the area of racial and ethnic discrimination. Anyhow, we will need to wait until a positive action measure based on art. 4 of the Race Directive will be brought before the CJEU.

5.1.4 Discrimination based on other grounds

5.1.4.1 Article 19 TFEU and its accomplishments

The introduction of 19 TFEU (with the Amsterdam Treaty) was of great significance for the further development of EU anti-discrimination law, as it gave the EU the chance to combat discrimination on other grounds than nationality and gender.[235]

Art. 19 TFEU:

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Although this article does not oblige to take measures to combat all forms of discrimination and does not have direct effect[236], it has proven its significance. First of

[233] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 377.
[234] D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 381.
[235] L. WADDINGTON & M. BELL, "More equal than others: Distinguishing European Union Equality Directives", *Common Market Law Review* 2001, 588; L. WADDINGTON, "Testing the Limits of the EC Treaty Article on non-discrimination", *Industrial Law Journal* 1999, 134.

all, it made some neglected grounds of discrimination such as race, religion, disability etc. visible.[237] Especially since grounds such as age, disability and sexual orientation are often absent in international human rights provisions on equality.[238] Secondly, this article was the basis for the creation and enactment of both the Race Directive (2000/43) and General Framework Directive (2000/78).[239]

5.1.4.1.1 The Race Directive and the General Framework Directive

As mentioned above, the Race Directive is of importance for the area of statutory social security. However, this Directive is only limited to the grounds of racial or ethnic origin. The General Framework Directive establishing a general framework for equal treatment in employment and occupation covers on the other hand several more prohibited grounds for discrimination: religion or belief, disability, age and sexual orientation. Nevertheless, art. 3 of this Directive explicitly excludes its application to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

Recital 13 clarifies that only (1) social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying art. 157 TFEU and (2) payments by a Member State in order to provide access to employment or maintaining employment fall outside the scope of the Directive. In *Defrenne*, the Court ruled that social security schemes or benefits (1) directly governed by legislation (2) without any element of agreement within the undertaking or the occupational branch concerned, (3) which are obligatorily applicable to general categories of workers cannot be considered as "pay" as defined in art. 157 TFEU.[240] Therefore, statutory social security schemes fall outside the scope of art. 157 TFEU and consequently, also outside the scope of the General Framework Directive.

5.1.4.1.2 Proposal for a New Directive on equal treatment

The Commission has created a proposal for a Council Directive on implementing the principle of equal treatment between persons of irrespective religion or belief, disability, age or sexual orientation (henceforth: New Directive). The legal basis is art. 19 TFEU.

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[236] M. DE MOL, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?", *Maastricht Journal of European and Comparative Law* 2011, 132, footnote 100; L. WADDINGTON, "Testing the Limits of the EC Treaty Article on non-discrimination", *Industrial Law Journal* 1999, 138.
[237] L. WADDINGTON, "Testing the Limits of the EC Treaty Article on non-discrimination", *Industrial Law Journal* 1999, 143.
[238] M. BELL, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, 24.
[239] M. BELL, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, 73.
[240] CJEU C-80/70, *Defrenne* 1971, *ECR* 1971, 00445.

The main reason for this New Directive is the establishment of an extensive protection against discrimination in other areas than the labor market.[241] This is a clear reference to the General Framework Directive whose scope is limited to employment and occupation. The proposal for the New Directive was drafted in 2008, but still no significant progress has been registered.[242] Some authors even suggest that the Directive will never be adopted.[243] Nevertheless, we will shortly discuss the main aspects of the New Directive.

5.1.4.1.2.1 The scope of application

The prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to (a) social protection, including social security and (b) heath care and social advantages. The Commission clarifies that these areas are only covert to the extent that an issue falls within the competences of the EU.[244] Differences based on nationality are not covered by the Directive.

The prohibition of discrimination based on disability receives special attention in order to make sure that people with disabilities have effective non-discriminatory access to (among others) social protection, social advantages and health care.

5.1.4.1.2.2 The concept of discrimination

The New Directive explicitly defines direct and indirect discrimination. With respect to indirect discrimination, a similar definition is used as in the Race Directive: "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

This definition immediately points out two things: (1) only proof of a particular disadvantage *compared with other persons* is demanded and proof that a *substantially higher proportion* of members of a particular belief, age, etc. is being disadvantaged.

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[241] EUROPEAN COMMISSION, proposal for a Council Directive on implementing the principle of equal treatment between persons of irrespective religion or belief, disability, age or sexual orientation, COM(2008) 426 final, 2.
[242] M. COUSINS, "Overview of recent cases before the European Court of Human Rights and the European Court of Justice (January-March 2012)", *European Journal of Sociall Security*, 2012, 140; Council of the European Union, 28th annual report on monitoring the application of EU law, SEC(2011)1093, 467.
[243] C. TOBLER, "C-236/09, Association belge des Consommateurs Test-Achats ABSL v Conseil des ministres"*, Common Market Law Review* 2011, 2055.
[244] EUROPEAN COMMISSION, proposal for a Council Directive on implementing the principle of equal treatment between persons of irrespective religion or belief, disability, age or sexual orientation, COM(2008) 426 final, 8.

Therefore, the use of statistical data to prove indirect discrimination is not necessary.[245] This is interesting for minorities and in cases where the necessary statistics are lacking. (2) It remains possible to justify an indirect discrimination when the difference in treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

With respect to direct discrimination, art. 2 (2) (6) of the New Directive allows Member States to provide for differences of treatment on grounds of age which shall not constitute discrimination, if (within the context of national law) they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. The Directive explicitly states that it shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.

Also, art. 2 (2) (7) permits Member States to adopt proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data. After the *Test Achats* case, these exceptions seem not to be tenable. On the one hand, the Court made clear that permitting direct discrimination is only possible in (very) rare occasions and on the condition that the provision sets a clear temporal limitation for the use of such derogation.[246] On the other hand, the CJEU condemned art. 5 (2) of Directive 2004/113, which stated that "Member States may decide […] to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data". The resemblance of this provision with the derogation provided for in art. 2 (2) (7) of the New Directive is striking.

5.1.4.1.2.3 Positive action

Like the Race Directive, the New Directive encourages positive action in order to prevent or compensate for disadvantages linked to religion or belief, disability, age or sexual orientation. As discussed earlier, there still is no case law on the possibilities and limits of positive action under the Race Directive. Therefore, we have to turn to the CJEU's case law on positive action in the area of gender discrimination and employment. As authors have suggested that this case law will also be applicable in a (sort of) same way to positive action under the Race Directive, the same can be said for positive action

[245] Compare with the definition of indirect discrimination in the light of Directive 79/7; M. BELL, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, 75; L. WADDINGTON & M. BELL, "More equal than others: Distinguishing European Union Equality Directives", *Common Market Law Review* 2001, 539; D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal* 2003, 333.

[246] F. TEMMING, "Case Note – ECJ finally paves the way for unisex premiums and benefits in insurance and related financial service contracts", *German Law Journal* 2012, 113 and 114; E. CARACCIOLO DI TORELLA, "Gender equality after Test Achats, *Journal of the Academy of European Law* 2012, 66.

under the New Directive. However, this new Directive covers various grounds of discrimination. The question therefore is whether the Court would adapt its opinion on the possibilities and limitations of positive action according to the ground used for a difference in treatment. In other words: will the diverse historical and social realities for different groups have an impact on the assessment of positive actions, implemented to ensure full equality in reality?[247]

However, as there is still no progress, there is a great chance that this Directive will never be adopted.[248] Therefore, we can conclude that despite the existence of art. 19 TFEU and several Directives in the area of statutory social security, the prohibition of discrimination based on other grounds than nationality, gender and race is not explicitly guaranteed in secondary EU law. Of course, this finding does not leave Member States free to discriminate, as primary legislation provides for a solution: the Charter of Fundamental Rights of the EU.

5.1.4.2 Charter of Fundamental Rights of the European Union

5.1.4.2.1 General

The Charter of Fundamental Rights of the European Union was signed and proclaimed on 7 December 2000. Originally, it had no legal binding effect, but in December 2009, with the entry into force of the Lisbon Treaty, the Charter was formally given the same binding legal force as the Treaties.[249]

Art. 6 (1) TEU:

The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and

[247] EUROPEAN COMMISSION (report drafted by M. DE VOS), *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78*, Luxembourg, Office for Official Publications of the European Communities, 2007, 31.

[248] Which was the case with the proposal for a Directive completing the implementation of the principle of equal treatment for men and women in statutory social security and occupational social security. EUROPEAN COMMISSION, Proposal for a Council Directive completing the implementation of the principle of equal treatment for men and women in statutory social security and occupational social security, COM(87) 494 final, *OJ* 1987, C 309, 10-13.

[249] Article 6 (1) TEU (former Article 6 TEU) : "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

With respect to the principles of equality and non-discrimination, Chapter III is of importance and in particular art. 20, 21 and 23.

Article 20: Equality before the law
Everyone is equal before the law.

Article 21: Non-discrimination
1. Any discrimination based on any ground such as 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 shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 23: Equality between men and women
Equality between men and women must be ensured in all areas, including employment, work and pay.
The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex.

Art. 21 explicitly enumerates a number of prohibited grounds for distinction. Although these grounds are not exhaustive, it is nevertheless important that some of them are explicitly mentioned. In this regard, the mentioning of "genetic features, disability, age and sexual orientation" is of significance, as those grounds for discrimination are often not explicitly prohibited in other international legal instruments.[250]

For the purpose of this research project, a detailed analysis of the equality and non-discrimination provisions of the Charter seems to be of less importance, as the preamble of the Charter clearly states that it *"reaffirms […] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on the European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights"*. We can therefore resign to the fact that the content and interpretation of the

[250] M. BELL, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, 24.

Charter provisions will resemble the established case law of the CJEU as already discussed above.[251]

Interestingly, before the Charter received binding legal force, the CJEU had already established another way to guarantee the prohibition of discrimination on several grounds. It concerned two cases of alleged age discrimination where the ruling of the Court seemed to carry important consequences for the prohibition of discrimination on other grounds (than nationality, age and race) in statutory social security. It will become clear that attributing binding legal force to the Charter did not annul this case law, but on the other hand has strengthened it.

5.1.4.2.2 Prohibitions of discrimination on specific grounds: general principles of EU law?

First, we will shortly discuss both cases. Secondly, we will address the implications of this case law for the area of statutory social security. As the cases concerned age discrimination and fell under the scope of the General Framework Directive (which excludes statutory social security), only the reasoning of the Court (and not the facts) will be presented.

5.1.4.2.2.1 The Mangold and Kükükdeveci case

Mangold

In *Mangold*, the CJEU was asked whether the national regulation at issue was in compliance with art. 6 (1) of Directive 2000/78, which provided for justifications of differences of treatment on grounds of age. The case concerned a horizontal dispute and the period of transposing the Directive had not yet expired.[252] This would normally imply that the applicant could not invoke art. 6 (1), as a Directive can only receive horizontal direct effect if the period for transposition has expired.

The CJEU stated that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. The sole purpose of the Directive is "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation". The Court continued that the source of the actual principle underlying the prohibition of such discrimination is to be found in various

[251] This finding is shared by other authors: C. TOBLER, "C-236/09, Association belge des Consommateurs Test-Achats ABSL v Conseil des ministres"*, Common Market Law Review* 2011, 2051; F. TEMMING, "Case Note – ECJ finally paves the way for unisex premiums and benefits in insurance and related financial service contracts", *German Law Journal* 2012, 115; F. FONTANELLI, "The European Union's Charter of Fundamental Rights two years later", *Perspectives on Federalism* 2011, 24.

[252] M. DE MOL, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?", *Maastricht Journal of European and Comparative Law* 2011, 118.

international instruments and in the constitutional traditions common to the Member States. Therefore, the principle of non-discrimination on grounds of age must be regarded as a general principle of EU law.

Finally, the Court draws two general conclusions from this reasoning: (1) the observance of the general principle of equal treatment with regard to age cannot as such be conditional upon the expiry of the period for the transposition of a Directive which only intends to lay down a general framework for combating age discrimination, and (2) it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which might conflict with EU law, even when the period prescribed for transposing that Directive has not yet expired.[253]

This judgment was surprising and left one important question unanswered: "What is the source of the horizontal direct effect: is it Directive 2000/78 or the general principle of EU law?"[254] This question was answered several years later.

Kükükdeveci

In *Kükükdeveci* (also a horizontal dispute but the period for the transposition of the Directive had expired) the Court repeated that the principle of non-discrimination on grounds of age must be regarded as a general principle of EU law and that Directive 2000/78 only gives specific expression to that principle. The CJEU enforces this claim by referring to article 6(1) TEU, which states that the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties and that art. 21(1) of the Charter prescribes that "[a]ny discrimination based on … age … shall be prohibited".[255]

The Court continued that because the prohibition of age discrimination is a general principle of EU law, national judges need to guarantee the legal protection which individuals derive from EU law and need to ensure the full effectiveness of that general principle of EU law. This responsibility can result in a refusal to apply a provision of national legislation which is contrary to that principle.[256]

This judgment made clear that it is the general principle of EU law which has horizontal direct effect, and not Directive 2000/78.[257]

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[253] CJEU C-144/04, *Mangold* [2005], *ECR* 2005, I-09981, paragraphs 74-78.
[254] M. DE MOL, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?", *Maastricht Journal of European and Comparative Law* 2011, 118.
[255] CJEU C-555/07, *Kükükdeveci* [2010], *ECR* 2010, I-00365, paragraphs 19-23.
[256] CJEU C-555/07, *Kükükdeveci* [2010], *ECR* 2010, I-00365, paragraphs 50-51.
[257] M. DE MOL, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?", *Maastricht Journal of European and*

5.1.4.2.2.2 The impact of *Mangold* and *Kükükdeveci* on statutory social security

Journal articles and case notes concerning these cases primarily focus on the fact that the CJEU has acknowledged horizontal direct effect to the general principle of non-discrimination based on age. Yet, this acknowledgement seems to be of little importance for statutory social security, as this area of social law nearly always concerns the vertical relation between government and individual. Consequently, discussing the pros and cons of this part of the judgment and the several opinions of authors is of little interest for this research project.

Nevertheless, this does not deprive these two judgments from their significance for statutory social security. Especially, the acknowledgement that the prohibition of age discrimination is a general principle of EU law could have an impact on the area of social security. First of all, it is common case law that general principles of EU law always have vertical direct effect and therefore can be applied to relations between individuals and government, such as statutory social security.[258] Secondly, a general principle of EU law (although derived by the CJEU from legislation in one specific area) is by its nature applicable to all areas governed by EU law, such as some aspects of statutory social security.[259] Therefore, the prohibition of age discrimination will also need to be guaranteed and observed in those areas of statutory social security falling under EU law.

Moreover, this case law will probably not only have its impact on age discrimination in statutory social security, but also on other forms of discrimination. After all, it is plausible that after these judgments, the CJEU will also recognize other prohibited forms of discrimination as being general principles of EU law.[260]

In this respect, the Charter of Fundamental Rights of the EU could play an important role, as the Court explicitly referred to it in *Kükükdeveci* and art. 21 (1) of this Charter prohibits several other grounds of discrimination. Moreover, in another case (*Test Achats*), the Court even explicitly states: "Article 6(2) EU provides that the European Union is to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, *as general principles of*

Comparative Law 2011, 119; E. MUIR, "Of ages in – and edges of – EU law", *Common Market Law Review* 2011, 53.

[258] K. LENAERTS & J.A. GUTIÉRREZ-FONS, "The constitutional allocation of powers and general principles of EU law", *Common Market Law Review* 2010, 1639; referring to Adv. Gen. SHARPSTON, opinion on *Bartsch* [C-427/06], *ECR* 2008, I-07245, paragraph 79 and references made there to case law.

[259] M. DE MOL, "Kücükdeveci: Mangold Revisited – Horizontal Direct effect of a General Principle of EU Law", *European Constitutional Law Review* 2010, 303.

[260] M. DE MOL, "Kücükdeveci: Mangold Revisited – Horizontal Direct effect of a General Principle of EU Law", *European Constitutional Law Review* 2010, 302.

Community law. Those fundamental rights are *incorporated in the Charter*, which, with effect from 1 December 2009, has the same legal status as the Treaties."[261]

Therefore, while pending the passage of the New Directive, the prohibition of discrimination based on religion or belief, disability, sexual orientation, etc. could already be guaranteed in statutory social security by following and anticipating on the CJEU's case law.[262] However, this conclusion may not hinder the passage of a new directive, as only in this way legal certainty about other prohibited grounds of discrimination (and the possible justifications) will be established for the area of statutory social security. In absence of this explicit legal framework, the CJEU will have to manage with the more general principles of equality and non-discrimination, which prohibit that comparable situations are treated in a different way and different situations are treated in a same way, unless it can be objectively justified.[263] It is clear that such general principle will create more room for possible justifications than a Directive which explicitly lays down which justifications could be allowed.[264]

5.2 Legal Framework at the level of the Council of Europe

With respect to the principles of equality and non-discrimination in the area of statutory social security, the Council of Europe has two interesting instruments: the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth: the Convention) and the (Revised) European Social Charter ((R)ESR). Although both instruments are of importance for the area of social security, the legal framework at the level of the Council of Europe will only contain legislation, legal doctrine and case law concerning the Convention. This limitation is motivated by the presence of a strong control mechanism for the protection of the rights guaranteed by the Convention and the absence of such a strong mechanism for the rights guaranteed under the (R)ESC.[265] As this research project does not only aim to tackle the principle of *segmenting* from a theoretical perspective, but also from a practical-oriented perspective, legal instruments which have no legal binding force are of less significance.

The most important source for establishing this framework will be the case law of the European Court of Human Rights (henceforth ECtHR) on the scope of the provisions of the Convention. Therefore, we try to derive from individual cases general principles in order to complete the legal framework. As the area of social security law is the primary

[261] CJEU C-236/09, *Test-Achats* [2011], *ECR* 2011, 00000, paragraph 16.
[262] As the judgments themselves do not specify their overall consequences, several views have been developed. Some of them will make this conclusion perhaps less evident. See e.g. E. MUIR, "Of ages in – and edges of – EU law", *Common Market Law Review* 2011, 56-60; M. DE MOL, "Kücükdeveci: Mangold Revisited – Horizontal Direct effect of a General Principle of EU Law", *European Constitutional Law Review* 2010, 302-303. 56-60.
[263] E. MUIR, "Of ages in – and edges of – EU law", *Common Market Law Review* 2011, 58.
[264] E. MUIR, "Of ages in – and edges of – EU law", *Common Market Law Review* 2011, 58.
[265] K. KAPUY, "The European Convention of Human rights" in D. PIETERS, *European and International Social Security Law,* Leuven, 2011-2012, 2.

focus of this research project, we will concentrate on cases concerning social security disputes. Occasionally, other cases will be discussed when they lay down important principles. As not all interesting cases regarding social security can be found in the HUDOC-database of the ECtHR, we will also rely on the published collection of cases by KLAUS, PIETERS and ZAGLMAYER.[266]

5.2.1 The European Convention for the protection of Human Rights and Fundamental Freedoms

Art. 14 of the Convention establishes the principle of non-discrimination and explicitly indicates several prohibited grounds:

Art. 14 ECHR:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Although this article seems to have a large scope of application, it is not a freestanding article.[267] It always has to be used in conjunction with another right guaranteed under the Convention or its protocols ("rights and freedoms *set forth in this Convention*"). In this respect, it is not necessary to prove that there has been a breach of one of the provisions of the Convention or even to allege such a breach.[268] However, the facts need to fall within the ambit of one or more of those provisions.[269] According to the ECtHR, this implicates at least that the subject-matter of the disadvantage constitutes one of the modalities of the exercise of a right guaranteed, or the measures complained of are linked to the exercise of a right guaranteed.[270]

The compulsory conjunction of art. 14 with one of the other rights covered by the Convention (or its protocols) made it very difficult in the past to invoke the principle of non-discrimination in social security cases. This is because the Convention originally only covered civil and political rights (afterwards, also right to property and right to

[266] K. KLAUS, D. PIETERS AND B. ZAGLMAYER, *Social Security Cases in Europe: The European Court of Human Rights,* Antwerp, Intersentia, 2007, 391 p. (Henceforth: *Social Security Cases in Europe*, 2007).
[267] M. COUSINS, *The European Convention of Human Rights and Social Security Law,* Antwerp, Intersentia, 2008, 65; P. LEACH, *Taking a Case to the European Court of Human* Rights, Oxford, Oxford University Press, 2011, 399; R.C.A. WHITE & C. OVERY, *The European Convention on Human Rights,* Oxford, Oxford University Press, 2010, 546.
[268] P. LEACH, *Taking a Case to the European Court of Human* Rights, Oxford, Oxford University Press, 2011, 401.
[269] See e.g. ECtHR 30 September 2003, *Poirrez*, 40892/98, paragraph 36.
[270] ECtHR 27 March 1998, *Petrovic,* 20458/92, paragraph 28; ECtHR 25 October 2005, *Okpisz*, 59140/00 found in *Social Security Cases in Europe*, 2007, 340-341.

education). Therefore, social security cases always fell outside the scope of the Convention and the protection provided for in art. 14 of the Convention could not be invoked.

Nowadays however, it is possible to bring some social security disputes for review to the ECtHR. This is not because an explicit right to social security was added to the Convention, but because there has been an evolution in the interpretation by the ECtHR. Whereas, at the beginning, social security cases were often rejected because the right to social security was simply not covered by the Convention, the ECtHR shifted its ground by arguing that the civil and political rights of the Convention could carry important implications of a social or economic nature.[271] As this evolution made it possible to bring some social security cases under the review of the ECtHR, it is necessary to discuss when a social security case could fall within the ambit of the Convention.

5.2.1.1 Social security and the scope of the Convention: analyzing the ECtHR's case law

As the right to social security is not explicitly guaranteed in the Convention, both applicants and the ECtHR started to range disputes in this area under rights which were explicitly included in the Convention. For this purpose, the following articles are still most frequently used: art. 6 (right to a fair trial), art. 1 of the First Protocol to the Convention (protection of property) and art. 8 (right to private life).[272]

5.2.1.1.1 Article 6 (1) of the Convention: right to a fair trial

5.2.1.1.1.1 Social security benefits

Art. 6 (1) of the Convention:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[271] K. KAPUY, "The European Convention of Human rights" in D. PIETERS, *European and International Social Security Law,* Leuven, 2011-2012, 4.
[272] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 223.

Already in the sixties and the seventies, applicants claimed that they were denied the right to a fair trial in social security cases.[273] As art. 6 (1) of the Convention only guarantees the right to a fair trial *in the determination of civil rights and obligations or of any criminal charge*, it seemed that disputes concerning social security benefits fell outside the scope of this article. Originally, this was also the opinion of the ECtHR.[274] However, in the eighties, this line of thought was replaced by a new one in two different social security cases that were judged on the same day: *Feldbrugge* and *Deumeland*.[275]

5.2.1.1.1.1.1 Cases

Feldbrugge and Deumeland

In *Feldbrugge*, the applicant claimed that she was denied a fair hearing by a tribunal in the determination of her right to sickness allowances. In *Deumeland*, the applicant claimed that the national social courts had not given her a fair trial within a reasonable time. The subject matter of the latter case was the application for a widow's supplementary pension, claiming that the death of her husband had been the consequence of an industrial accident.

The ECtHR needed to decide in both cases whether the subject matter of the case could be considered as a "contestation of a civil right". The Court clarified that art. 6 of the Convention does not only cover private-law disputes in a traditional sense (i.e. disputes between individuals or between an individual and the State when the latter was acting as a private person and was therefore subjected to private law). The Court continued with its opinion in *König*: in order to determine whether or not a right is civil, reference must be made to the substantive content and effects of the right – and not its legal classification – under domestic law of the State concerned.[276]

As it was the first time that the ECtHR dealt with the field of social security, it needed to decide when social security entitlements could be regarded as civil rights.[277] In this respect, the Court investigated both the public and private law features of the social insurance schemes at issue. Features of public law were (a) character of the legislation, (b) compulsory nature of the insurance and (c) assumption by the State of responsibility for social protection. Features of private law were: (a) personal and economic nature of the asserted right, (b) connection with the contract of employment and (c) affinities with

[273] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 223.
[274] For case law see K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 223, footnote 5.
[275] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 223.
[276] ECtHR 28 June 1978, *König,* 6232/73, paragraph 89.
[277] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 224.

insurance under the ordinary law. Although both public and private law features were present, the Court decided that the private law features were predominant in both cases. Therefore, the entitlements in question were considered a civil right and enjoyed the right to a fair trial guaranteed under art. 6(1) of the Convention.[278] This test was later on also applied in social security disputes involving a public servant. In these cases, the Court also found that the public law features could not counterbalance the private law features.[279]

Salesi

In *Salesi*, the ECtHR needed to decide whether welfare assistance benefits (and not social insurance benefits, such as in *Feldbrugge* and *Deumeland*) could also fall under the scope of art. 6 (1) of the Convention. Although there are differences between social insurance and welfare assistance, the Court found that at the present stage of the development of social security law, they could not be regarded as fundamental differences. Therefore, the Court used the same test as in *Feldbrugge* and *Deumeland* and looked at both the public and private features of the welfare assistance benefit in question.

Again, the Court decided in favour of the private law features. Although there were certain public law features, the ECtHR decided in favour of the private law features because the applicant was not affected in her relations with the administrative authorities (acting in the exercise of discretionary powers) as such. On the contrary, she suffered an interference with her means of subsistence and was therefore claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Constitution. Therefore, the Court did not see any convincing reason to distinguish between the applicant's right to welfare benefits and the rights to social insurance benefits asserted in *Feldbrugge* and *Deumeland*. [280] This line of thought was later on confirmed in *Mennitto*.[281]

Schuler-Zgraggen

Finally, in *Schuler-Zgraggen*, the ECtHR followed the same reasoning as in *Salesi*: the applicant suffered an interference with her means of subsistence and she was claiming an individual, economic right derived from specific rules laid down in a federal statute. Therefore, there was no convincing reason to distinguish between the applicant's right to

[278] ECtHR 29 May 1986, *Feldbrugge,* 8562/79, paragraphs 26-42; ECtHR 29 May 1986, *Deumeland,* 9384/81, paragraphs 60-75.
[279] ECtHR 26 November 1992, *Lombardo*, 11519/85, paragraphs 14-17; ECtHR 12 December 1999, *Antonakopoulos,* 37098/97, paragraphs 20-21.
[280] ECtHR 26 February 1993, *Salesi,* 13023/87, paragraphs 17-19.
[281] ECtHR 5 October 2000, *Mennitto*, 33804/96, paragraphs 21-28.

an invalidity pension and the rights to social-insurance benefits asserted in *Feldbrugge* and *Deumeland*.[282]

However, the most important part of this judgment was the explicit acknowledgement that due to developments in law (initiated by *Feldbrugge, Deumeland* and *Salesi*) the general rule today is that art. 6 (1) of the Convention does apply in the field of social insurance, including even welfare assistance.[283]

5.2.1.1.1.1.2 Conclusion: general principles

We can conclude that both social insurance and social assistance benefits fall under the scope of art. 6 (1) of the Convention if they provide for an individual, economic right derived from specific rules laid down in national legislation. Consequently, benefits which are granted within the discretionary power of an administrative authority will not fall under the scope of art. 6 (1) of the Convention.[284]

Finally, it may not be forgotten that art. 6 (1) of the Convention only covers a *dispute* over a civil *right*. Firstly, it must involve a right which is recognized under domestic law, at least on arguable grounds. Secondly, the dispute must be genuine and serious, relating not only to the actual existence of a right, but also to its scope and the manner of its exercise. Thirdly, the outcome of the proceedings must be directly decisive for the right in question.[285]

5.2.1.1.1.2 Social security contributions

The Court was not only asked to answer the question whether disputes concerning the entitlement to a social insurance or social welfare benefit fall under the scope of art. 6 (1) of the Convention. The same question was also raised for disputes concerning the payment of contributions to a social security scheme.

In *Schouten and Meldrum*, the Court was confronted with this question with respect to the payment of health insurance contributions. Although the ECtHR acknowledged that the approach to benefits and to contributions is not necessarily the same, it nevertheless found that the method of analysis adopted in *Feldbrugge* was also appropriate for this case. Consequently, it analyzed the features of both public and private law.[286] Again, the Court found that the features of private law were of greater significance than those of

[282] ECtHR 24 June 1993, *Schuler-Zgraggen,* 14518/89, paragraphs 44-46.
[283] ECtHR 24 June 1993, *Schuler-Zgraggen,* 14518/89, paragraphs 46.
[284] M. COUSINS, *The European Convention of Human Rights and Social Security Law,* Antwerp, Intersentia, 2008, 109; K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 225. Both authors refer to the *Machatova* case. ECtHR 2 July 1997, *Machatova,* 27552/95.
[285] ECtHR 25 November 1993, *Zanders,* 14282/88, paragraph 22; ECtHR 29 September 1995, *Masson and Van Zon*, 15346/89 and 15379/89, paragraph 44.
[286] ECtHR 9 December 1994, *Schouten and Meldrum,* 19005/91 and 19006/91, paragraphs 49-51.

public law. Therefore, the dispute concerning the payment of the contribution at issue fell under the scope of art. 6 (1) of the Convention.

Finally, in *Meulendijks, Perhirin and others*, *M.B. v France* and *Diaz Ochoa*, the question whether disputes concerning the payment of contributions fell within the ambit of art. 6 (1) of the Convention, was not even raised anymore.[287]

5.2.1.1.2 Article 1 of the First Protocol to the Convention: protection of property

Art. 1 First Protocol:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Already in the nineties, the ECtHR was confronted with the issue whether the right to property could be applied in social security cases when e.g. there was a faulty calculation of a benefit or when there was a loss of benefit due to a change of the entitlement criteria.[288] This question can be divided into two sub questions: (1) Is the obligation to pay social security contributions contrary to the right of a peaceful enjoyment of possessions? and (2) Does the payment of such contributions create a property right for the beneficiary?[289]

Besides these questions, another issue was also raised: does art. 1 of the First protocol create a right to social security? This question is of importance, as the Convention itself does not explicitly grant such a right. First, we will consider the questions about the payment of contributions and the (violation) of the right to property. Afterwards, we will look whether art. 1 of the First Protocol also implies a right to social security.

[287] A. GÓMEZ HEREDERO, *Social security as a human right. The protection afforded by the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 2007, 20-22; K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 223.
[288] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 225.
[289] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 226.

5.2.1.1.2.1 The (mandatory) payment of contributions and the (violation) of the right to property

With respect to the first question, the ECtHR has made it clear that mandatory payments of social security contributions should be regarded as an interference with the right to a peaceful enjoyment of one's possessions. However, art. 1 (2) of the First Protocol *in fine* explicitly allows an exception: a State may enforce laws to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. This exception is only possible when the measure is based on law and is proportionate.[290]

With respect to the second question, the Court's answer has evolved over time.

5.2.1.1.2.1.1 Cases

Gaygusuz

In *Gaygusuz*, the applicant was a Turkish national who applied in Austria for an (advance on his pension in the form of) emergency assistance, after his entitlement to an (advance on his retirement pension in the form of) unemployment benefit was expired. He was refused this assistance based on fact that he did not have the Austrian nationality. Before the Court could answer whether or not this decision constituted a discrimination, it needed to decide whether the subject matter of the case fell under the scope of article 1 of the First Protocol.

The Court stated that the emergency assistance was granted to persons who have exhausted their entitlement to an unemployment benefit and satisfied the other statutory conditions laid down in national legislation. Therefore, the entitlement to this emergency assistance was linked to the payment of contributions to the unemployment insurance fund and paying contributions to this fund was a precondition for the payment of an unemployment benefit. Consequently, the Court concluded that there was no entitlement to emergency assistance when no contributions to the employment insurance fund have been paid. On the other hand, if an individual has paid these contributions, the right to an emergency assistance would be a pecuniary right in the light of art. 1 of the First Protocol.[291]

[290] E.g. ECtHR 14 December 1965, *X v. The Netherlands*, 2065/63; ECtHR 1 December 1985, *Svenska Managementgruppen AB*, 11036/84. For more cases, see K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 226.
[291] ECtHR 16 September 1996, *Gaygusuz*, 17371/90, paragraphs 39-41.

In this case, the ECtHR strongly emphasized the link between the two benefits and the payment of contributions.[292] This way, the Court seems to establish that benefits, which are not financed by individual contributions and which are not linked to other forms of social security benefits, will not fall under the protection of the right to possessions.

Carlin

In *Carlin*, the Court noted that the applicant had not made direct contributions for his disablement benefit. However, this benefit was only granted to qualified workers who were subject to the national insurance scheme. Because of this, the Court found that there was a link between the entitlement to a disablement benefit and the applicant's status as an employee paying contributions to the national insurance scheme.[293]

Asmundsson

In *Asmundsson*, the applicant claimed that the discontinuation of his disability pension gave rise to a violation of art. 1 of the First Protocol. The Court repeated its *Gaygusuz* opinion that the rights stemming from payment of contributions to social insurance systems are pecuniary rights for the purposes of art. 1 of the First Protocol. However, even if art. 1 of the First Protocol guarantees benefits to a person who has contributed to a social insurance system, the same provisions do not guarantee a particular amount of those benefits.[294]

Poirrez

In *Poirrez*, the Court adopted another line of thought. The applicant was adopted by a Frenchmen, but still had the Ivorian nationality. He was physically disabled since the age of seven. He applied for an "allowance for disabled adults". However, his application was rejected on the ground that he was neither a French national nor a national of a country which had entered into a reciprocity agreement with France.

The Court referred to its judgment in *Gaygusuz*. However, it clarified that although the applicant in that case had paid contributions and subsequently was entitled to emergency assistance, this does not necessarily implicate that a non-contributory social benefit such as in *Poirrez* does not also give rise to a pecuniary right under the scope of art. 1 of the First Protocol.[295] The Court found (among other considerations) that the fact that the applicant had previously received a minimum welfare benefit, had been issued with an invalids' card, resided in France and was the adopted son of a French citizen

[292] K. KAPUY, "The European Convention of Human rights" in D. PIETERS, *European and International Social Security Law,* Leuven, 2011-2012, 9.
[293] ECtHR 3 December 1997, *Carlin,* 27537/95 found in *Social Security Cases in Europe*, 2007, 157-159.
[294] ECtHR 12 October 2004, *Asmundsson,* 60669/00, paragraph 39.
[295] ECtHR 30 September 2003, *Poirrez*, 40892/98, paragraph 37.

residing and working in France, made that the applicant had a pecuniary right for the purposes of art. 1 of the First Protocol.[296] This judgment seemed to bring non-contributory benefits also under the scope of art. 1 of the First Protocol.[297] It is clear that after *Poirrez*, two distinct lines of authority existed.[298]

Stec and others

The existence of two different lines of authority (*Gaygusuz* versus *Poirrez*) inevitably led to legal uncertainty. Therefore, in 2006 the Grand Chamber decided which of the two lines of thought needed to be followed. This clarification was made in *Stec and others*.

This case concerned sex-based differences for entitlement to a "reduced earnings allowance" and a "retirement allowance".[299] The Court recalled that the benefits at issue were non-contributory benefits, to the extent that they had been funded by general taxation rather than the national insurance scheme. Although only employees or former employees (who had suffered a decrease in earning capacity due to an accident at work or an occupational disease) were eligible for these benefits, the entitlement to the benefits was not conditional on the payment of contributions to the national insurance fund.[300] At this point in the judgment, the Grand Chamber admits that two distinct lines of authority have emerged in the case-law of the Court: in some cases a welfare benefit only fell within the scope of art. 1 of the First Protocol when contributions had been paid to the fund that financed the benefit. In other cases, even a welfare benefit in a non-contributory scheme could fall within the ambit of art. 1 of the First Protocol. The Grand Chamber decided to reexamine this issue.[301]

As the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions, the ECtHR found it is noteworthy to look at the case-law on the applicability of art. 6 (1) of the Convention. After all, the Court found that it was in the interests of the coherence of the Convention as a whole that the autonomous concept of "possessions" in art. 1 of the First Protocol would be interpreted in a way which is consistent with the concept of "pecuniary right" under art. 6 (1) of the Convention.

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[296] ECtHR 30 September 2003, *Poirrez*, 40892/98, paragraphs 38-42.
[297] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 227. This was already earlier confirmed in *Buchen*. See: ECtHR 26 November 2002, *Buchen,* 36541/97, paragraph 46.
[298] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 227.
[299] ECTHR Grand Chamber, *Annual Activity Report 2005*, published in January 2006, http://www.echr.coe.int/NR/rdonlyres/AF356FA8-1861-4A6B-95E9-28ED53787710/0/2005GrandChamberactivityreport.pdf, 32.
[300] Compare with ECtHR 3 December 1997, *Carlin,* 27537/95.
[301] ECtHR Grand Chamber, 6 July 2005 (decision on admissibility), *Stec and others*, 65731/01 and 65900/01, paragraphs 42-47.

The Court recalled the general rule that art. 6 (1) of the Convention applies in the field of social insurance, including even welfare assistance.[302] Keeping this case law in mind, the Court decided that in a modern, democratic State, many individuals are completely dependent for survival on social security and welfare benefits. Many national legal systems recognize that such individuals require a degree of certainty and security, and provide for benefits to be paid as of right (subject to the fulfillment of the conditions of eligibility). Consequently, where an individual has an assertable right under domestic law to a welfare benefit, this benefit should be protected by art. 1 of the First Protocol. Consequently, there is no more distinction between contributory and non-contributory benefits for the purposes of the applicability of art. (1) of the First Protocol.[303]

5.2.1.1.2.1.2 Conclusion: general principles

We can conclude that nowadays a social security benefit – whether it is contributory or non-contributory – which an individual has an assertable right to under domestic law, falls under the scope of art. 1 of the First Protocol. Consequently, and similar to art. 6 (1) of the Convention, benefits which are purely granted on a discretionary basis fall outside the scope of art. 1 of the First Protocol.[304]

5.2.1.1.2.2 The right to social security

The question whether art. 1 of the First Protocol grants an individual the right to a social security benefit was also put to the Court.

5.2.1.1.2.2.1 Cases

Kopecky

In *Kopecky* (not a social security case), the Court listed the general principles of art. 1 of the First Protocol. Two of them are of importance for this section: (1) art. 1 of the First Protocol does not guarantee the right to acquire property, and (2) "The Contracting States enjoy a wide margin of appreciation with regard to the exclusion of certain categories of former owners from such entitlement. Where categories of owners are excluded in this way, their claims for restitution cannot provide the basis for a "legitimate expectation" attracting the protection of Article 1 of Protocol No. 1. On the other hand, once a Contracting State, having ratified the Convention including Protocol No. 1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right

[302] ECtHR 24 June 1993, *Schuler-Zgraggen,* 14518/89, paragraphs 46.
[303] ECtHR Grand Chamber, 6 July 2005 (decision on admissibility), *Stec and others*, 65731/01 and 65900/01, paragraphs 48-53.
[304] M. COUSINS, *The European Convention of Human Rights and Social Security Law,* Antwerp, Intersentia, 2008, 22.

protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement".[305]

Stec

In *Stec*, the Court applied these general principles to the area of social security: as art. 1 of the First Protocol does not create a right to acquire property, a Member State cannot be restricted in the decision whether or not to establish any form of social security scheme, nor in the choice of the type or amount of benefits to provide under such scheme. However, if a Member State's legislation provides for the payment of a benefit, that legislation must be regarded as generating a proprietary interest falling within the ambit of art. 1 of the First Protocol (for persons satisfying its requirements).[306] But art. 1 of the First protocol cannot be interpreted as granting individuals also the right to an exact amount.[307]

Hoogendijk and Asmundson

In *Hoogendijk*, the Court clarified that an interference with a proprietary interest can only be in compliance with art. 1 of the First Protocol if it strikes a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The ECtHR gives a rather broad margin of appreciation to the Member States for determining what is in the general interest of the community.[308] In this respect, the Court accepted social justice and a State's economic well-being.[309] Also determining which contributions need to be collected involves an appreciation of political, economic and social questions for which the Member States receive a large margin of appreciation.[310]

The interference must not only pursue a legitimate aim "in the public interest", but must also constitute a reasonable relationship of proportionality between the means employed

[305] ECtHR 28 September 2004, *Kopecký,* 44912/98, paragraph 35.
[306] ECtHR Grand Chamber, 6 July 2005 (decision on admissibility), *Stec and others*, 65731/01 and 65900/01, paragraphs 54; ECtHR 27 March 2007 (decision on admissibility), *Luczak,* 77782/01, p. 10.
[307] ECtHR 6 September 1995, *Federspev,* 22867/93 found in *Social Security Cases in Europe*, 2007, 129-130.
[308] ECtHR 6 January 2005, *Hoogendijk,* 58641/00 found in *Social Security Cases in Europe*, 2007, 319-324.
[309] ECtHR 6 January 2005, *Hoogendijk,* 58641/00 found in *Social Security Cases in Europe*, 2007, 319-324; ECtHR 22 September 2005, *Goudswaard – Van Der Lans*, 75255/01 found in *Social Security Cases in Europe*, 2007, 331-335.
[310] ECtHR 16 september 2003, *Balaz,* 60243/00 found in *Social Security Cases in Europe*, 2007, 275-277; ECtHR 25 May 2004, *Fratrik*, 51224/99 found in *Social Security Cases in Europe*, 2007, 297-300.

and the aim pursued. According to the Court, this implicates that the fair balance will not be attained when an individual has to bear an "individual and excessive burden".[311]

In case of a reduction or loss of a social benefit due to a legislative change of the entitlement criteria, the Court rarely concludes that the applicant who has seen his/her benefit reduced (or even disappeared) was made to bear an individual and excessive burden.[312] An exception was *Asmundsson*. In this case, the applicant contested a decision, taken under new legislation, to cease the payment of the disability pension which he had received for nearly twenty years after a work accident. In this case, the Court found that although the legitimate aim in the public interest was present (i.e. financial difficulties of the pension fund) the applicant needed to bear an individual and excessive burden as the vast majority of the 689 disability pensioners continued to receive disability benefits at the same level as before the new legislation, whereas only a small minority of disability pensioners had to bear the most drastic measure of all, namely the total loss of their pension entitlements.[313]

Lakicevic

Finally in *Lakicevic,* the applicants closed their private law firms and submitted papers to start their retirements. Their old-age and disability pension entitlements, as well as the exact amount of their pensions were established by decisions of the Pension and Disability Insurance Fund. However, as they were encouraged to resume working on a part-time basis, they reopened their own legal practices on a part-time basis. Sometime later, the Pension Fund suspended the payment of the applicants' pensions until such time as they ceased professional activity. The applicants alleged an interference with their right of peaceful enjoyment of possessions.

The Court found that a reduction or discontinuance of a pension may constitute an interference with possessions and therefore needs to be justified. In the area of social legislation (such as pensions), Member States enjoy a wide margin of appreciation which may lead them to adjust, cap or even reduce the amount of pensions normally payable to the qualifying population. However, such measures must be implemented in a non-discriminatory manner and need to comply with the requirements of proportionality. As in this case, the legislation did not provide for a reasonable and commensurate reduction or for a transitional period to adjust individuals to the new scheme (but for the total suspension of their entitlement), the applicants needed to bear an excessive and

[311] ECtHR 6 January 2005, *Hoogendijk,* 58641/00 found in *Social Security Cases in Europe*, 2007, 319-324.. This individual and excessive burden was found in ECtHR 12 October 2004, *Asmundsson,* 60669/00, paragraph 45.
[312] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 227. E.g. ECtHR 6 January 2005, *Hoogendijk,* 58641/00 found in *Social Security Cases in Europe*, 2007, 319-324; ECtHR 22 September 2005, *Goudswaard – Van Der Lans*, 75255/01 found in *Social Security Cases in Europe*, 2007, 331-335.
[313] ECtHR 12 October 2004, *Asmundsson,* 60669/00, paragraph 45.

disproportionate burden. Therefore, the Court found that art. 1 of the First protocol was violated.[314]

This judgment seems to establish that imposing (new) limitations to benefits has to be "phased and partial".[315] However, this is still not continuous case law, as another section of the Court still adopts the more restrictive approach in the *Sulcs* case.[316]

5.2.1.1.2.2.2 Conclusion: general principles

Art. 1 of the First protocol does not constitute a right to a social security benefit. However, if a Member State's legislation provides for the payment of such a benefit, the legislation generates a proprietary interest falling within the ambit of art. 1 of the First Protocol (for persons satisfying its requirements). This legislation does not guarantee the right to an exact amount of a benefit.

An interference with a proprietary interest is only acceptable if it strikes a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. With respect to the general interest of community a Member State has a large margin of appreciation.

Its interference must also constitute a reasonable relationship of proportionality between the means employed and the aim pursued. This implicates that an individual does not have to bear an "individual and excessive burden". The case law of the Court is not univocal on whether or not there is an excessive burden on an individual.

5.2.1.1.3 Article 8 of the Convention: respect for family and private life

Art. 8 of the Convention:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[314] ECtHR 13 December 2011, *Lakicevic and others*, 27458/06, 37205/06, 37207/06 and 33604/07, paragraphs 59-73.
[315] M. COUSINS, "Overview of recent cases before the European Court of Human Rights and the European Court of Justice (September-December 2011)", *European Journal of Social Security* 2012, 44.
[316] See Cousins description of this case in M. COUSINS, "Overview of recent cases before the European Court of Human Rights and the European Court of Justice (September-December 2011)", *European Journal of Social Security* 2012, 48-49.

As art. 8 of the Convention has been described as "one of the most dynamically interpreted provisions of the Convention"[317], individuals have tried to invoke art. 8 of the Convention in cases of a "reduction, loss or refusal of a social security benefit".[318] We will discuss the case law concerning this article in three subdivisions: the respect for family life, the respect for private life and same-sex relationships.[319]

5.2.1.1.3.1 Respect for family life

5.2.1.1.3.1.1 Cases

Andersson and Kullmann

In *Andersson and Kullmann*, the applicants had received financial support because the income of the husband was not sufficient to support the family. His wife was a housewife who took care of the children. The new application for such financial support was however refused. Instead, the children were given priority for placement at a day home care center so that the wife also could take up employment. The applicants refused this offer as the wife wanted to stay home and take care of the children. They alleged a violation of art. 8 of the Convention, not only because they were refused the financial support, but also because the reason for this support was the fact that the wife wished to stay at home to look after her children.[320]

The Court repeated that the Convention does not as such guarantee a right to public assistance in any form (financial support or supplying for day care home centers). Moreover, although art. 8 of the Convention demands respect for family life, this article does not impose on Member States the obligation to provide for financial assistance to individuals in order to make it possible for one parent to stay at home to look after the children.[321]

Petrovic

In *Petrovic*, the applicant, instead of his wife, took parental leave to look after their child. He applied for a parental leave allowance. However, he was denied this allowance because national legislation provided that only mothers could claim such an allowance when a child was born.

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[317] See M. COUSINS, *The European Convention of Human Rights and Social Security Law,* Antwerp, Intersentia, 2008, 47 and references made there.
[318] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 230.
[319] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 231-233.
[320] Facts derived from *Social Security Cases in Europe,* 2007, 66.
[321] ECtHR 4 March 1986, *Andersson and Kullmann,* 11776/85 found in *Social Security Cases in Europe*, 2007, 66-68.

The Court needed to consider whether the subject matter of this case fell under the scope of art. 8 of the Convention. The Court considered that the refusal to grant the applicant a parental leave allowance could not amount to a failure to respect family life. This is because art. 8 of the Convention does not impose any positive obligation on Member States to provide for a financial assistance such as a parental leave allowance. However, by paying the allowance, a Member State promotes family life and therefore necessarily affects the way in which the latter is organized as it enables one of the parents to stay at home to look after the children.

The ECtHR concluded that by granting parental leave allowance, States are able to demonstrate their respect for family life within the meaning of art. 8 of the Convention. Therefore, the allowance falls under the scope of that provision.[322]

Okpisz

Cases concerning child benefits were also brought before the ECtHR. In *Okpisz*, the applicants immigrated with their children to Germany. They were rejected a recognition as immigrants of German origin. Instead, they received residence titles for exceptional purposes. Due to a change in legislation, foreigners only became entitled to child benefits if they had a residence permit or a provisional residence permit at their disposal. As the applicants did not meet these conditions, their child benefits were refused for the future.[323]

The Court found that by granting child benefits, States are able to demonstrate their respect for family life within the meaning of art. 8 of the Convention. Therefore, child benefits fall within the ambit of that provision.[324]

5.2.1.1.3.1.2 Conclusion: general principles

Art. 8 of the Convention does not impose any positive obligation on Member States to provide for financial assistance. However, sometimes a Member State promotes family life and affects the way in which it is organized by paying e.g. child allowances or parental leave allowances. Consequently, such benefits fall under the scope of art. 8 of the Convention. Especially benefits providing for "cost compensation or income-replacement for new-born or adopted children and for child-related absence of work" will fall within the ambit of art. 8 of the convention.[325]

[322] ECtHR 27 March 1998, *Petrovic,* 20458/92, paragraph 22-29.
[323] Facts derived from *Social Security Cases in Europe,* 2007, 340.
[324] ECtHR 25 October 2005, *Okpisz*, 59140/00 found in *Social Security Cases in Europe*, 2007, 340-341.
[325] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 232.

5.2.1.1.3.2 Respect for private life

In *Goodwin*, art. 8 of the Convention was invoked with regard to the respect to private life. The applicant was a post-operative male to female transsexual. However, her official record continued to state her sex as male. With respect to social security, this led to the problem that she would be ineligible for a State pension at the age of 60 (the age of entitlement for women). She was also informed that her pension contributions would continue until she reached the age of 65 (the age of entitlement for men).

In previous cases, the ECtHR had already ruled that the absence of legal recognition of a gender reassignment could affect a person's private life and therefore fell under the scope of art. 8 of the Convention.[326] In *Goodwin*, the ECtHR concluded even a violation of the right to respect private life: the applicant had undergone gender reassignment surgery and lived in society as a female. Nonetheless, the applicant remained, for legal purposes, a male which continued to have effects on the applicant's life (e.g. retirement age). This discordance between one's position in society and the status imposed by law (refusing to recognize a change of gender) could lead to stress and alienation. This consequence cannot be regarded as a minor inconvenience arising from a formality.

After many other considerations, the Court concluded that a Member State can no longer claim that such matter falls within its margin of appreciation. As no significant factors of public interest weigh against the interest of the applicant in obtaining legal recognition of her gender reassignment, the fair balance tilts decisively in favor of the applicant.[327] For a similar case concerning gender reassignment and social security, see *Grant.*[328]

5.2.1.1.3.3 Same-sex relationships

Another interesting issue concerns long-term same-sex relationships. Can these relationships enjoy the protection of respect for family life and private life? It is interesting to see that the ECtHR has always approached these relationships separately in the light of respect for family life and in the light of respect for private life.

5.2.1.1.3.3.1 Cases

Mata Estevez

In *Mata Estevez*, the applicant had lived with another man for more than ten years. During that period, the applicant and his partner ran a joint household, pooling their income and sharing their expenses. As under Spanish law only heterosexual couples

[326] K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 232.
[327] ECtHR 11 July 2002, *Goodwin,* 28957/95, paragraphs 71-93.
[328] ECtHR 23 May 2006, *Grant,* 32570/03.

could marry, they could not. After his husband died, the applicant claimed a survivor's pension. However, this was refused since he had not been married and therefore he could not legally be considered as a surviving spouse.

The Court stated that long-term homosexual relationships do not fall within the scope of the right to respect for family life. Although there is a growing tendency in a number of European States towards the legal and judicial recognition of stable partnerships between homosexuals, this remained an area in which Member States still enjoyed a wide margin of appreciation (given the existence of little common ground between the Member States).[329]

With respect to private life, the Court immediately acknowledged that the applicant's emotional and sexual relationship related to his private life within the meaning of art. 8 of the Convention.

P.B. and J.S. v. Austria and J.M. v United Kingdom

In July 2010, the Court revised its position as it considered that after the judgment in *Mata Estevez*, a rapid evolution of social attitudes towards same-sex couples took place in many Member States. Already a considerable number of Member States have now afforded legal recognition to same-sex couples and even certain provisions of EU law reflect a growing tendency to include same-sex couples in the notion of "family". In view of this evolution, the Court found it artificial to maintain the view that a same-sex couple cannot enjoy "family life" in the light of art. 8 of the Convention. Consequently, it decided that a cohabiting same-sex couple living in a stable *de facto* partnership, also falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.[330]

Strangely enough, the Court did not repeat this opinion in a similar case only two months later. In this case, the Court repeated that the consensus among European States in favour of assimilating same-sex relationships to heterosexual relationships has undoubtedly strengthened since it examined this issue in *Mata Estevez.* Unfortunately, the Court decided to not go further on this as the subject-matter of the case already fell under the scope of art. 1 of the First Protocol.[331] The fact that the ECtHR did not seize its chance in *J.M. v United Kingdom* to contribute to the emerging change in its case-law, was regretted by judges GARLICKI, HIRVELÄ and VUCINIC in their concurring opinion.[332]

[329] ECtHR 10 May 2001, *Mata Estevez*, 56501/00, p. 4. This was affirmed in ECtHR 22 July 2010, *P.B. and J.S. v. Austria,* 18984/02, paragraph 26.
[330] ECtHR 22 July 2010, *P.B. and J.S. v. Austria,* 18984/02, paragraphs 29-30.
[331] ECtHR 28 September 2010, *J.M. v United Kingdom,* 37060/06, paragraph 50.
[332] Concurring opinion on ECtHR 28 September 2010, *J.M. v United Kingdom,* 37060/06, p. 29.

5.2.1.1.3.3.2 Conclusion: general principles

The Court has always acknowledged that an applicant's emotional and sexual relationship relates to his private life. However, same-sex relationships were originally not considered to fall under the concept of "family life". Consequently, a homosexual couple which was refused a social security benefit showing respect for or even promote family life, could not invoke art. 8 of the Convention.

However, the Court has changed its opinion due to an evolution of social attitudes towards same-sex couples among the Member States. Although it is not always explicitly stated, cohabiting same-sex relations with a stable *de facto* partnership fall within the meaning of family life of art. 8 of the Convention.

5.2.1.1.4 Social security and the scope of the Convention: overall conclusion

By shifting its ground and starting to range some aspects of social security under the rights guaranteed by the Convention, the ECtHR has made it possible to subject some social security disputes to the judgment of the Court. It is interesting to see that with respect to the three articles discussed, the case law has evolved over time while covering more and more aspects of social security. It will be interesting for the future to show whether the ECtHR will continue to extend the guarantees of the Convention to other aspects of social security.

For now, we can conclude the following. (1) Both social insurance and social assistance benefits fall under the scope of art. 6 (1) of the Convention and art. 1 of the First protocol if they provide for an individual, economic right derived from specific rules laid down in national legislation. Consequently, benefits granted on a discretionary basis fall outside the scope of the Convention. (2) Art. 8 of the Convention does not impose any positive obligation on Member States to provide for financial assistance. However, if a Member State promotes family life by paying e.g. child allowances or parental leave allowances, these benefits fall under the scope of art. 8 of the Convention. (3) The absence of legal recognition of a gender reassignment can affect a person's private life and falls under the protection for private life. (4) Nowadays, same-sex relationships fall within the meaning of both private and family life.

The Convention does not guarantee a right to social security or to the exact amount of a benefit. However, if a Member State provides for the payment of a benefit, this will generate a proprietary interest falling within the ambit of art. 1 of the First Protocol (for persons satisfying its requirements). At this point, an interference is only acceptable if it strikes a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The interference must also constitute a reasonable relationship of proportionality between the

means employed and the aim pursued. This implicates that an individual does not have to bear an "individual and excessive burden".

5.2.1.2 Article 14 of the Convention: prohibition of discrimination and possible justification in the area of social security

Art. 14 of the Convention prohibits discrimination based on "any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Although the article only mentions some grounds of discrimination, the phrasing "any ground such as" clarifies that this list is not exhaustive.[333] Examples of other prohibited grounds are marital status, sexual orientation, disability, residence etc.[334] Discrimination exists (1) when persons in a similar situation are treated in a different way and (2) when there is no reasonable and objective justification for this difference in treatment.

With respect to the first condition, the applicant has to show that he/she has been treated differently in comparison with a person in a similar situation. The situation must not be identical, but analogous or relatively similar.[335] It is interesting to see that most of the time, the ECtHR does not examine whether there actually is a difference in treatment between persons who find themselves in a similar situation.[336]

In the *Belgian Linguistic* case, the ECtHR has elaborated on the content of the second condition. In this case, the Court clarified that art. 14 of the Convention does not forbid every difference in treatment in the exercise of the rights and freedoms. This implicates that a differential treatment remains possible under certain conditions. The Court immediately provides for these conditions: a difference in treatment will not violate art. 14 of the Convention if it has an objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration. According to the Court, the principles which normally prevail in democratic societies will be of importance for this assessment. The difference in

[333] ECtHR 16 March 2010, *Carson and others*, 42184/05, paragraph 70; ECtHR 12 april 2006, *Stec and others*, 65731/01 and 65900/01, paragraph 50; ECtHR 2 November 2010, *Yigit,* 3976/05, paragraph 78; M. COUSINS, *The European Convention of Human Rights and Social Security Law,* Antwerp, Intersentia, 2008, 66.-67; J.-F. RENUCCI, *Introduction to the European Court on Human Rights,* Strasbourg, Council of Europe Publishing, 2005, 19.
[334] P. LEACH, *Taking a Case to the European Court of Human* Rights, Oxford, Oxford University Press, 2011, 401. See references made there.
[335] P. LEACH, *Taking a Case to the European Court of Human* Rights, Oxford, Oxford University Press, 2011, 402.
[336] M. COUSINS, *The European Convention of Human Rights and Social Security Law,* Antwerp, Intersentia, 2008, 68; O.M. ARNARDÓTTIR, "Multidimensional equality from within. Themes from the European Convention on Human Rights" in D. SCHIEK & V. CHEGE (eds.), *European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law ,* Abingdon, Routledge-Cavendish, 2009, 60.

treatment must not only pursue a legitimate aim, but it must also constitute a reasonable relationship of proportionality between the means employed and the aim pursued.[337]

In *Stec*, the Court clarified that every Member State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin of appreciation will depend on the subject matter and the background.[338] For example, with respect to differential treatment based on nationality, gender, race and sexual orientation, this margin is rather limited as the Court only accepts very weighty reasons in order to justify such differential treatment.[339] The same goes for particularly vulnerable groups in society, who have suffered considerable discrimination in the past, such as disabled people or persons suffering from HIV/AIDS.[340] On the other hand, when it comes to general measures of economic or social strategy, the ECtHR allows a wide margin of appreciation to the Member States. Because of their direct knowledge of their society and its needs, national authorities are in principle better placed than an international judge to appreciate what is in the public interest on social or economic grounds. In these cases, the ECtHR will normally respect the legislature's policy choice, unless it is "manifestly without reasonable foundation".[341]

A determining factor for the scope of a Member State's margin of appreciation is the fact whether a consensus ("common standard") exists among the Member States on the particular matter.[342] For example: does the majority of Member States grant a parental leave (allowance) to fathers? Does the majority of Member States allow a civil partnership for same-sex couples? If the Court finds out that there is a rather broad consensus, on a particular subject matter, the Member States' margin of appreciation on this matter is narrowed down. If on the other hand there is no common standard, the Member States have a considerable freedom of movement on the subject matter.

To summarize, the ECtHR uses a three stage test in order to determine whether or not art. 14 of the Convention has been violated:[343] (1) is there a difference in treatment between persons in analogous or relevantly similar situations? If so, (2) (a) does this

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[337] ECtHR 23 July 1968, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, paragraph 10 (p.30-31).
[338] ECtHR 12 April 2006, *Stec and others*, 65731/01 and 65900/01, paragraph 51-52.
[339] M. COUSINS, *The European Convention of Human Rights and Social Security Law,* Antwerp, Intersentia, 2008, 67; P. LEACH, *Taking a Case to the European Court of Human* Rights, Oxford, Oxford University Press, 2011, 403; R.C.A. WHITE & C. OVERY, *The European Convention on Human Rights,* Oxford, Oxford University Press, 2010, 564.
[340] ECtHR 20 May 2010, *Kiss*, 38832/06, paragraph 42, ECtHR 10 March 2011, *Kiyutin v Russia,* 2700/10, paragraph 64.
[341] ECtHR 12 April 2006, *Stec and others*, 65731/01 and 65900/01, paragraph 52.
[342] P. LEACH, *Taking a Case to the European Court of Human* Rights, Oxford, Oxford University Press, 2011, 403.
[343] This three stage test is adopted from M. COUSINS, *The European Convention of Human Rights and Social Security Law,* Antwerp, Intersentia, 2008, 68. See also ECtHR 16 March 2010, *Carson and others*, 42184/05, paragraph 61.

difference in treatment pursue a legitimate aim?, and (2) (b) is there a reasonable relationship of proportionality between the means employed and the aim pursued? As the Court has often a different approach for each prohibited ground for discrimination, we will discuss them separately.

5.2.1.2.1 Discrimination based on nationality

5.2.1.2.1.1 Cases

Gaygusuz

In *Gaygusuz*, the applicant was a Turkish national who applied in Austria for an emergency assistance, after his entitlement to an unemployment benefit was expired. He was refused this assistance based on fact that he did not have the Austrian nationality. After the Court decided that this subject matter fell under the scope of art. 1 of the First Protocol, it needed to decide whether this difference in treatment constituted a direct discrimination (as benefit was refused solely because of his nationality).

The ECtHR stated that a differential treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Although Member States enjoy a certain margin of appreciation, the Court found that a difference of treatment exclusively based on the ground of nationality can only be justified with very weighty reasons.[344]

The Austrian Government put forward the following arguments: (a) every state has a special responsibility with respect to its citizens and must therefore provide for their essential needs. (2) The national legislation provided for some exception to the condition of having the Austrian nationality. (3) Austria was at that time not bound by any international obligation to grant emergency assistance to Turkish nationals.

Nonetheless, the Court concluded that there was a violation of art. 14 of the Convention, as it rejected every single argument: (1) the applicant was legally residing in Austria and was paying his contributions to the unemployment insurance in the same capacity and on the same basis as Austrian national. As he only failed to satisfy the condition of nationality, he was in a similar situation to that of Austrian nationals with respect to his entitlement to the emergency assistance. (2) Although there were exceptions to the condition of nationality, these exceptions were not applicable to the applicant. (3) Finally, even though Austria was not bound by a reciprocal agreement with Turkey, by ratifying the Convention, Austria has entered into the obligation “to secure to everyone within [its]

[344] ECtHR 16 September 1996, *Gaygusuz*, 17371/90, paragraph 42.

jurisdiction the rights and freedoms defined in Section I of the Convention" (art. 1 of the Convention).[345]

Poirrez

In *Poirrez*, the applicant was adopted by a Frenchmen, but still had the Ivorian nationality and he was physically disabled since the age of seven. He applied for an "allowance for disabled adults". However, his application was rejected on the ground that he was neither a French national nor a national of a country which had entered into a reciprocity agreement with France.

The Court made a similar assessment as in *Gaygusuz*: (1) the applicant was legally residing in France, where he received the minimum welfare benefit. It was not even alleged that the applicant did not satisfy the other statutory conditions for the entitlement to the benefit in question. As he only failed to satisfy the condition of nationality, he was in a similar situation to that of French nationals or nationals of a country that had signed a reciprocity agreement with respect to this benefit. (3) Finally, even though France was not bound by a reciprocal agreement with the Ivory Coast, by ratifying the Convention, France has entered into the obligation "to secure to everyone within [its] jurisdiction the rights and freedoms defined in Section I of the Convention" (art. 1 of the Convention).[346] Once again, in this case the Member State could not put forward very weighty reasons to justify the difference in treatment based on nationality.

Andrejeva

In *Andrejeva*, the applicant had become a stateless person due to the collapse of the Soviet Union. The Latvian authorities granted her the status of "permanent resident non-citizen". When calculating her retirement pension, the Latvian authorities did not take into account her periods of employment in Kiev and Moscow. However, if she had the Latvian nationality, these periods of employment abroad would have been taken into account.[347]

The Court accepts that this difference in treatment pursues the legitimate aim of protecting a country's economic system. After all, after the break-up of the Soviet Union, the Latvian authorities were confronted with a lot of problems linked to both the need to set up a viable social-security system and the reduced capacity of the national budget.

As the legitimate aim was present, the Court continued by examining the reasonable relationship of proportionality between the means employed and the legitimate aim pursued. It recalled that the refusal to take into account the applicant's years of

[345] ECtHR 16 September 1996, *Gaygusuz*, 17371/90, paragraph 45-52.
[346] ECtHR 30 September 2003, *Poirrez*, 40892/98, paragraph 47-50.
[347] Summarizing of the facts derived from K. KAPUY, "The European Convention of Human rights" in D. PIETERS, *European and International Social Security Law,* Leuven, 2011-2012, 19-20.

employment outside Latvia was exclusively based on the fact that she did not have the Latvian citizenship. As this constituted a difference in treatment based on nationality, only very weighty reasons could justify it. The Court did not find those reasons. (1) It has not been alleged that the applicant did not satisfy the other statutory conditions for the entitlement to the benefit in question. As she only failed to satisfy the condition of nationality, she was in a similar situation to persons who had an identical or similar career but who were recognized as Latvian citizens. (2) The applicant had the status of a "permanent resident non-citizen" of Latvia. Therefore, Latvia was the only Member State with which she had any stable legal ties and thus the only Member State which could assume responsibility for her in terms of social security.[348]

Luczak

Finally*, Luczak* needs to be discussed. In this case, the applicant was a French national who moved to Poland. The applicant and his wife (who was a polish national) jointly bought a farm and the applicant decided to make his living from this farm. Therefore, he asked to be admitted to the farmers' social security scheme. However, this was refused as he was not a Polish national (which was a condition laid down in national legislation). The applicant alleged discrimination based on nationality.

The Court found that the applicant was in a relevantly similar position to Polish nationals who applied for admission to the farmers' scheme. The Court further noted that the applicant was permanently residing in Poland, had previously been affiliated to the general social security scheme and had contributed as a taxpayer to the funding of the farmers' scheme.

The creation of a particular social security scheme for farmers (which is heavily subsidized from the public purse and is provided cover to those admitted to it on more favorable terms than a general social security scheme) could be regarded as pursuing an economic or social strategy falling within a State's margin of appreciation. However, the Court reaffirms that such legislation must be compatible with art. 14 of the Convention. Consequently, also the principle of proportionality needs to be considered. In this respect, the ECtHR concludes that even when weighty reasons have been advanced for excluding an individual from the scheme, such exclusion may not leave him in a situation in which he is denied any social insurance cover, whether under a general or a specific scheme. Leaving an employed or self-employed person bereft of any social security cover would be incompatible with current trends in social security legislation in the Member States.[349] Therefore, the Court found a violation of art. 14 of the Convention.

[348] ECtHR 18 February 2009, *Andrejeva*, 55707/00, 87-88.
[349] ECtHR 27 November 2011, *Luczak*, 77782/01, paragraph 49-60.

5.2.1.2.1.2 Conclusion: general principles

The above discussed case law clearly shows that the ECtHR strongly opposes to differential treatment based on nationality. Only very weighty reasons could allow a justification. The Court does not easily find the Member States' arguments weighty enough. E.g. when an individual satisfies all the conditions for entitlement except for the one concerning nationality, the Court nearly never accepts the refusal of the benefits because of nationality.

Consequently, cases with differential treatment explicitly based on nationality (direct discrimination) will nearly always be considered as violating art. 14 of the Convention.[350]

5.2.1.2.2 Discrimination based on gender

The ECtHR keeps close control on the prohibition of differential treatment based on gender, as it emphasizes that the advancement of the equality of the sexes is a major goal in all the Member States of the Council of Europe.[351] Therefore, only very weighty reasons can justify a difference in treatment which is exclusively based on the ground of sex.[352] In a recent judgment the Grand Chamber has even stated that references to traditions, general assumptions or prevailing social attitudes in a Member State are an insufficient justification for a difference in treatment on the grounds of sex.[353]

5.2.1.2.2.1 Cases

Van Raalte

In *Van Raalte*, the 45-year-old (male) applicant had never been married and had no children. Nonetheless, he was obliged to pay contributions for childcare benefits, whereas unmarried and childless women of the same age were exempted from the obligation to pay these contributions. The government defended this legislation, as women aged 45 fundamentally differ from men of the same age because for biological reasons, they were less likely to be able to have children. The applicant alleged discrimination based on gender.

The Court found that this situation involved a difference in treatment between persons in similar situations, based on gender. Subsequently, it needed to decide whether this differential treatment could be objectively and reasonably justified. The Court noted that

[350] M. COUSINS, *The European Convention of Human Rights and Social Security Law,* Antwerp, Intersentia, 2008, 69.
[351] ECtHR 24 June 1993, *Schuler-Zgraggen,* 14518/89, paragraph 67.
[352] ECtHR 21 February 1997, *Van Raalte*, 20060/92, paragraph 40-44, ECtHR 11 June 2002, *Willis,* 36042/97, paragraph 39; ECtHR 10 May 2007, *Runkee and White*, 42949/98 and 53134/99, paragraph 36.
[353] ECtHR 22 March 2012, *Markin,* 30078/06, paragraph 127.

a key feature of the social security scheme in question was that the obligation to pay contributions did not at all depend on a potential entitlement to those benefits. Accordingly, the justification for the exemption in the present case (in particular women aged 45 were much likely to be able to have children) ran counter to the underlying character of the scheme (paying contributions regardless of potential entitlement).

Although Member States enjoy a margin of appreciation as regards the introduction of exemptions to contributory obligations, art. 14 of the Convention requires that these exemptions apply in a same way to men and women. Only compelling reasons can justify a difference in treatment. The Court did not found such compelling reasons and concluded that there was a violation of art. 14 of the Convention: (1) just as women over 45 may give birth to children, men of 45 or younger may be unable to procreate; (2) an unmarried childless woman aged 45 may become eligible for the benefits in question when she marries a man who already has children from a previous marriage; (3) the argument that levying contributions under a child care benefits scheme from unmarried childless women would impose an unfair emotional burden on them, might equally well be applied to unmarried childless men or to childless couples.[354]

Wessels-Bergervoet

In *Wessels-Bergervoet* the applicant was excluded from insurance under the General Old Age Pensions Act (for a total period of 19 years) because she was married to a man who was not insured under the Act during periods of employment abroad. However, if a married man were to be in the same situation as the applicant, he would not have been excluded from the insurance scheme in this manner.

The Court stated that this reduction in the applicant's benefits was exclusively based on the fact that she was a married woman, as she satisfied all the other conditions for entitlement. The Court did not agree with the Member State's opinion that preventing the undesirable accumulation of pension rights is an objective and reasonable justification, as the legislation did allow for a married man in the same situation to accumulate pension rights. Together with some other considerations, the ECtHR concluded a violation of art. 14 of the Convention.[355]

Willis

Another case concerning gender discrimination was *Willis*. The applicant was married and had two children. At the age of 39, his wife died. For the greater part of her married life, she had been the primary breadwinner and she had paid full social-security contributions as an employed earner. The applicant applied for the payment of social benefits equivalent to those which a widow whose husband had died in similar circumstances would have received: a widow's payment and a widowed mother's

[354] ECtHR 21 February 1997, *Van Raalte*, 20060/92, paragraph 39.
[355] ECtHR 4 June 2002, *Wessels-Bergervoet,* 34462/97, paragraphs 46-55.

allowance. However, the applicant was informed that these benefits did not exist for widowers. Consequently, discrimination based on gender was alleged.

The applicant argued that this difference in treatment between men and women was not based on any objective and reasonable justification, but on gender-stereotyping and broad generalizations which no longer reflected social conditions in an accurate way.

The Court observed that the refusal to grant the applicant the benefits in question was solely based on the fact that he was a man, as it had not been argued that the applicant failed to satisfy any of the other statutory conditions. The Court found that this difference in treatment between men and women was not based on any "objective and reasonable justification".[356]

Petrovic

In *Petrovic*, the applicant, instead of his wife, took parental leave to look after their child. He applied for a parental leave allowance. However, he was denied this benefit because national legislation provided that when a child was born, only mothers could claim such an allowance. The Court needed to decide whether this refusal constituted a discrimination based on gender.

The Court explained that parental leave and a parental leave allowance are intended to enable the beneficiary to stay at home to look after his/her child. While differences might exist between mother and father in their relationship with the child, both parents are nevertheless similarly placed in respect of taking care of their child in this period.

The Court continues that the option of giving financial assistance to the mother or the father (at the couple's choice) for staying at home to look after their children is relatively recent. Originally, such measures were primarily intended to protect mothers and to enable them to look after very young children. Only gradually society has moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children, which resulted in the extension of these benefits to fathers. However, the Court concludes that there still remains a great disparity on this matter between the Member States. While most Member States have made fathers entitled to parental leave, only few of them have also made them entitled to a parental leave allowance. Therefore, the government in question – by refusing the parental leave allowance to the applicant – acted within its margin of appreciation. Consequently, there is no violation of art. 14 of the Convention.[357]

[356] ECtHR 11 June 2002, *Willis,* 36042/97, paragraphs 37-43.
[357] ECtHR 27 March 1998, *Petrovic,* 20458/92, paragraph 30-43.

Markin

In a recent judgment, the Grand Chamber has reversed its opinion in *Petrovic*. In *Markin*, the Russian authorities refused to grant the male applicant, who was a serviceman, parental leave, as only servicewomen were entitled to three years of parental leave.

The Court underlined that it must take into account the changing conditions in Member States and respond to any emerging consensus. As in *Petrovic,* the Court found that as far as the role of taking care of the child during the period corresponding to parental leave is concerned, men and women are "similarly placed".

Subsequently, the ECtHR stated that the rights of military personnel may in certain circumstances be more restricted to a greater degree than they would be in the case of civilians. However, there has been an evolution of society: in a majority of the European countries, the legislation provides that parental leave may be taken by civilian men and women. Moreover, in a significant number of the Member States, both servicemen and servicewomen are also entitled to parental leave. The ECtHR concluded that the exclusion of servicemen from the entitlement to parental leave, while servicewomen are entitled to such leave, cannot be reasonably or objectively justified.[358] A fortiori, excluding male civilians from entitlement to a parental leave allowance will also not be accepted by the Court.

Hoogendijk

Finally, *Hoogendijk* is worth mentioning, as in this case the ECtHR acknowledged the possibility of indirect discrimination: a general policy or measure which has disproportionate prejudicial effects on a particular group, although it does not specifically aim or direct at that group.

Although statistics are not automatically sufficient for indicating a discriminatory practice, the Court decided that when an applicant is able to show on a basis of undisputed official statistics that a specific rule affects a clearly higher percentage of women than men, the Member State needs to show that this difference in treatment is the consequence of objective factors which are not gender related.[359]

5.2.1.2.2.2 Conclusion: general principles

Again, a differential treatment exclusively based on the ground of sex will be very difficult to justify. The ECtHR does often find that the reasons put forward by the Member States are not weighty enough, especially when an individual satisfies all the conditions and a benefit is simply refused because of his/her gender.

[358] ECtHR 22 March 2012, *Markin,* 30078/06, paragraphs 124-151.
[359] ECtHR 6 January 2005, *Hoogendijk,* 58641/00 found in *Social Security Cases in Europe*, 2007, 319-324.

However, when on a given matter there still exists great disparity between the Member States, the government nevertheless enjoys a large margin of appreciation. This margin will only be narrowed down when the social attitudes and regulations in most Member States are univocal and a consensus is reached.

5.2.1.2.3 Discrimination based on race

The ECtHR has adopted the opinion that special importance should be attached to discrimination based on race.[360] Especially in the mid 2000's, several cases regarding differential treatment of Roma people were brought to Strasbourg.[361] As these cases do not involve social security disputes, only the general principles of the Court's case law will be discussed.

The case law of the Court states that ethnicity and race are related concepts: whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features (e.g. skin colour or facial characteristics), ethnicity is based on the idea of societal groups marked e.g. by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. According to the Court, this kind of discrimination is a particularly invidious kind and requires special vigilance and a vigorous reaction from the authorities. It is for this reason that the authorities must use all available means to combat racism.[362]

The Court also clarifies that when the applicants have submitted sufficiently reliable and significant evidence giving rise to a strong presumption of discrimination, the burden of proof shifts to the Member States, which need to prove that the difference was the result of objective factors unrelated to ethnic origin. This implies that a Member State must show that the national measure constituting a difference in treatment has a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim pursued. However, in the case of a differential treatment based on race, color or ethnic origin, the Court will interpret this objective and reasonable justification *as strictly as possible*.[363] This restriction seems to be more severe than is the case for a justification on grounds of gender and sexual orientation where the ECtHR only refers to "very weighty reasons" or "particularly serious reasons".

Finally, the ECtHR always repeats that a difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin cannot be objectively justified in a contemporary democratic society built on the principles of pluralism and

[360] ECtHR 14 December 1973, *East African Asians,* 4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4526/70-4530/70, paragraph 207.
[361] P. LEACH, *Taking a Case to the European Court of Human* Rights, Oxford, Oxford University Press, 2011, 405.
[362] ECtHR 22 December 2009, *Sejdic and Finci*, 27996/06 and 34836/09, paragraph 43.
[363] E.G. ECtHR 13 November 2007, *D.H. and Others*, *57325/00,* paragraphs 195-196.

respect for different cultures.[364] Please note that with respect to gender and sexual orientation, the Court has always forbidden differential treatment exclusively based on those grounds. However, regarding race and ethnic origin, a difference in treatment which is in a decisive extent based on that ground is also prohibited.

We can conclude that if one would make a hierarchy between the prohibited grounds for discrimination, it is clear that the prohibition of discrimination based on race would be on top. A differential treatment based exclusively or to a decisive extent on race of ethnic origin will simply not be accepted. Other forms of distinction based on race could be justified. However, the Court will interpret the notion of objective and reasonable justification *as strictly as possible*.

5.2.1.2.4 Discrimination based on sexual orientation

Originally, differential treatment based on sexual orientation often fell within the (large) margin of appreciation of the Member States. Nowadays, the Court seems to have narrowed this margin and broadened the protection against such type of discrimination.

5.2.1.2.4.1 Cases

Mata Estevez

In *Mata Estevez*, the applicant was refused a survivor's pension after the death of his male partner (with whom he had lived for more ten years). This refusal was based on the fact that the applicant had not been married, so legally he could not be considered as a surviving spouse for the purposes of a survivor's pension. However, under the national legislation, same-sex couples could simply not get married.

The Court repeated that a difference in treatment is discriminatory if it cannot be objectively and reasonably justified. In this case, the Court accepted that the national legislation concerning survivor's allowances had a legitimate aim, namely the protection of a family based on marriage bonds and that the differential treatment needed to be considered to fall within the Member State's margin of appreciation. Consequently, no discriminatory interference with the applicant's private life was pronounced.[365]

Karner

The Court strengthened the conditions for the possibility of a difference in treatment based on sexual orientation in *Karner* (not a social security dispute). The applicant had lived together with his partner with whom he had a homosexual relationship. They shared the expenses on the flat. The partner of the applicant died after he had

[364] E.g. ECtHR 13 November 2007, *D.H. and Others*, *57325/00,* paragraph 176; ECtHR 22 December 2009, *Sejdic and Finci*, 27996/06 and 34836/09, paragraph 44.
[365] ECtHR 10 May 2001, *Mata Estevez*, 56501/00, p. 4-5.

designated the applicant as his heir. After some time, the landlord of the flat brought proceedings for termination of the tenancy. The lower courts dismissed the action, as they found that the national legislation which provided that family members had a right to succeed to a tenancy, was also applicable to a homosexual relationship. However, the Supreme Court quashed the decisions of the lower courts and terminated the lease, as it found that the notion of "life companion" in national legislation needed to be interpreted (according to the time when it was enacted and the legislature's intention) to not include persons of the same sex. Discrimination on the ground of sexual orientation was alleged. The Court clarified that just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification. Consequently, the margin of appreciation of Member States is narrow: the principle of proportionality does not merely require that the measure chosen is suited for realizing the aim pursued, but it must also be shown that in order to achieve that aim, it was necessary to exclude a certain category (i.e. same-sex relationships). In *Karner*, the government was not able to satisfy these conditions.[366]

J.M. v United Kingdom

The approach of *Karner* was also followed in a social security case: *J.M. v United Kingdom*. The applicant was a divorced mother of two children. After her divorce, she had lived with a woman in a same-sex relationship.[367] Because of this, her contributions to the cost of her children's upbringing were assessed less favorable than when she would have been involved in a same-sex relationship. The Court repeated that where the complaint is one of discrimination on grounds of sexual orientation, the margin of appreciation is narrow. Only particularly convincing and weighty reasons can justify such a difference in treatment. The ECtHR found that no such reasons where present and therefore decided that art. 14 of the Convention had been violated.[368]

5.2.1.2.4.2 Conclusion: general principle

Over the years, the Court has strengthened the protection of discrimination based on sexual orientation. Whereas at the beginning, the Member States had a large margin of appreciation, in *Karner* this margin was narrowed down. Nowadays, only particularly convincing and weighty reasons can justify a differential treatment based on sexual orientation.

5.2.1.2.5 Discrimination based on marital status

[366] ECtHR 24 July 2003*, Karner*, 40016/98, paragraphs 34-43.
[367] M. COUSINS, "Overview of recent cases before the European Court of Human Rights and the European Court of Justice, and legislative and policy developments (August-October 2010)", *European Journal of Soical Security*, 374.
[368] ECtHR 28 September 2010, *J.M. v United Kingdom,* 37060/06, 54-58.

The difference between married, civil partnership and informal co-habiting couples can be of significant importance with respect to the entitlement to social security benefits. The question however is whether it is legally allowed to provide for differential treatment regarding one's marital or civil status. Although we have already discussed the prohibition of discrimination based on sexual orientation, same-sex relationships have also played an important role in the ECtHR's case law on differential treatment based on civil status. This is because for a long time, same-sex couples could not enter into marriage and civil partnership and could therefore not give their relationship a formal legal recognition. This lack of formal recognition had consequences for the entitlement to some social security benefits.

5.2.1.2.5.1 Cases

Shackell

In *Shackell*, the applicant complained that the lack of provision for benefits to unmarried surviving partners constituted a discrimination based on (un)married status. The Court referred to a judgment from 1986, which stated that although in some fields, the *de facto* relationship of cohabiters is now recognized, there still exist differences between married and unmarried couples, in particular differences in legal status and legal effects. In this case, the Court concluded that marriage continued to be characterized by a corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who cohabit.

In *Shackell* (14 years after the previous judgment), the Court noted that there was an increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, marriage remained an institution which was widely accepted as conferring a particular status on those who enter it. Therefore, the ECtHR concluded that the situation of the applicant was still not comparable to that of a widow.[369]

Burden

In *Burden* (not a social security dispute), two sisters who had lived together in a stable, committed and mutually supportive relationship for all their lives, claimed that they could properly be regarded as being in a similar situation to a married couple or a same-sex couple in civil partnership. The Grand Chamber remarked that the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners, as the very essence of the connection between siblings is consanguinity, whereas marriage or civil partnership with family members is forbidden.

[369] ECtHR 27 April 2000, *Shackell,* 45851/99, p. 5.

Subsequently, the Grand Chamber clarified that rather than the length or the supportive nature of a relationship, the existence of a public undertaking resulting in several rights and obligations is a determining factor. The ECtHR concluded that just as there can be no analogy between married and civil partnership couples, on the one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand, the absence of a legally binding agreement between the two sisters rendered their relationship of co-habitation fundamentally different to that of a married or civil partnership couple.[370]

The *Burden* case was important, as it indicated that a married couple and a civil partnership couple could find themselves in similar situations.

M.V. v United Kingdom

The question whether a co-habiting same-sex couple not able to marry or to enter into a civil partnership under national law, could be regarded as similar to a married couple, was raised in *M.V. v United Kingdom*.

In this case, the applicant was living with his partner to whom he was not married, but nevertheless had a long-term and stable homosexual relationship. During their relationship, the possibility of a civil partnership did not yet exist and therefore no legal recognition of their relationship was possible. After his partner's death, the applicant asked for a bereavement payment. However, this was refused, as the benefit was only granted to the survivor of a married couple. In 2005 (after the applicant's partner had died), the eligibility for this benefit was broadened to civil partnership.

The applicant found that his relationship could not be compared to that of an unmarried couple, since it had been impossible for him to gain a formal legal recognition of their relationship. The applicant was of the opinion that the *Burden* judgment implicitly stated that in situations where same-sex couples cannot enter into civil partnership, their position would nevertheless be recognized as similar to that of a married couple.[371]

The Court underlined that there is a fundamental difference between personal relationships based on legally binding commitment which give rise to certain rights and duties, and informal personal relationships (even if they are being permanent and supportive). As the relationship of the applicant could only be categorized under the latter, he was not in a similar situation as a surviving spouse. The fact that the possibility of civil partnership did not yet exist during his partner's lifetime, is only a criticism to the time it took for the Member State to enact necessary legislation. Moreover, the government may not be criticized for this delay, as at the relevant point in time, there was no consensus among the Member States on the formal recognition of same-sex

[370] ECtHR 29 April 2008, *Burden*, 13378/05, paragraphs 58-66.
[371] ECtHR 23 June 2009, *M.V. v United Kingdom*, 11313/02, p. 5.

relationships. If this had been otherwise, the margin of appreciation of the Member State in question would have been narrowed.[372]

Yigit

In *Yigit,* the applicant was married to her husband trough a religious marriage which was not recognized under Turkish law. After her husband had died, she applied for a survivor's pension and a health insurance covered on the basis of her husband's entitlement. However, these benefits were refused because her marriage was not legally recognized. Thus, religiously the applicant was married, but as this marriage was not recognized under Turkish law, legally she had only been informally co-habiting with her partner. The Chamber had approached this case only from art. 8 of the Convention, whereas the Grand Chamber asked both parties to also address the issue of compliance with art. 14 of the Convention.[373]

The Grand Chamber recalled that marriage is widely accepted as conferring a particular status and particular rights on those who enter it. Marriage is characterized by several rights and obligations which differentiate it markedly from the situation of a man and woman who cohabit. Therefore, Member States have a certain margin of appreciation to treat married and unmarried couples in a different way, particularly with respect to social and fiscal policy such as taxation, pensions and social security.

The Court needed to decide whether the differential treatment in question could be objectively justified. First of all, the difference in treatment pursued a legitimate aim, as marriage in accordance with the Turkish Civil Code specifically aims to protect women by laying down a minimum age for marriage and establishing a set of rights and obligations for women. Second of all, the Court noted that the applicant was aware of her situation and knew that she needed to regularize her relationship in accordance with the Civil Code in order to be entitled to benefits on her partner's death. The rules lying down the conditions for civil marriage were clear and accessible and the arrangements for contracting a civil marriage were straightforward and did not place an excessive burden on the persons concerned. Furthermore, the applicant had a sufficiently long time – twenty-six years – for contracting a civil marriage. Consequently, the Court accepted that there was a reasonable relationship of proportionality and therefore art. 14 of the Convention was not violated.[374]

5.2.1.2.5.2 Conclusion: general principles

Although there is an increased social acceptance of stable personal relationships outside the traditional notion of marriage, marriage remains a specific institution

[372] ECtHR 23 June 2009, *M.V. v United Kingdom*, 11313/02, p. 6.
[373] ECtHR 2 November 2010, *Yigit,* 3976/05, paragraph 53.
[374] ECtHR 2 November 2010, *Yigit,* 3976/05, paragraphs 67-88.

conferring a particular status on those who enter it. Therefore, a married couple and an informally co-habiting couple cannot find themselves in similar situations.

Because of the rise of civil partnership, another institution constituting a legally binding commitment which gives rise to certain rights and duties was created. Therefore, a married couple and a civil partnership couple can find themselves in a similar situation. We can conclude that married couples and life partnership couples can find themselves in a similar situation. Therefore, a difference in treatment between those two types of marital status may result in discrimination.

The situations of married and life partnership couples will not be similar to those of informal cohabiting couples. This is because the lack of legal recognition which imposes rights and duties to both partners. This has consequences for same-sex couples who are not able to get married or to enter into a civil partnership, as they will be considered as an informally cohabiting couple. In this case, the Member State will not be obliged to grant the couple the same benefits as it would grant to a married or civil partnership couple.[375] This unfavorable situation for same-sex couples could disappear when art. 12 of the Convention ("right to marry") is interpreted as obliging Member States to grant same-sex couples access to marriage. However, the Court has already ruled that art. 12 of the Convention does not impose such obligation.[376]

5.2.1.2.6 Discrimination based on health status

Although art. 14 of the Convention does not explicitly list "health status" or "any medical condition", the ECtHR has recognized in *Glor* that a physical disability and various other health impairments fall within the scope of this article.[377] We will discuss the prohibition of discrimination based on a person's health status for two groups (each one case) which are considered vulnerable: disabled persons and persons suffering from HIV/AIDS. The fact that it concerns vulnerable groups will play an important role in the ECtHR's assessment of differential treatment.

5.2.1.2.6.1 Disabled persons

In *B. v United Kingdom*, the applicant, who had a severe learning disability, had three children. She received child benefits and means-tested income support. The applicant was under a duty to report any change of circumstance which might affect her entitlement to benefits. After some time, the applicant's three children were taken into care. At that time, she had no services of a social worker and she did not receive any practical help from the local authority disability team. She therefore did not realize that this was a fact which she was required to report. However, national legislation provided

[375] The same goes for religious marriages who are not recognized under national law.
[376] ECtHR 24 June 2010, *Schalk and Kopf,* 30141/04, paragraph 63.
[377] ECtHR 30 April 2009, *Glor,* 13444/04, paragraphs 52-56; ECtHR 10 March 2011, *Kiyutin v Russia,* 2700/10, paragraph 57.

for the possibility to recover the benefits she was not entitled to anymore. The applicant claimed that, as someone who did not have the capacity to understand the obligation to report, she should have been treated differently from someone who did.

The Court found that the decision not to treat the applicant differently from someone who had the capacity to understand the requirement to report pursued a legitimate aim (i.e. ensuring the smooth operation of the welfare system and the facilitation of the recovery of overpaid benefits). With respect to the relationship of proportionality, the Court recalled that art. 1 of the First Protocol does not prevent public authorities from correcting mistakes in the award of benefits (even if they result from their own negligence). However, this principle cannot prevail in a situation where the individual concerned is required to bear an excessive burden as a result of a measure divesting him or her of a benefit. In this case, Court found that the national authorities had taken sufficient steps to prevent such excessive burden: the applicant was not required to pay interest on the overpaid sums, there was a statutory limit on the amount that could be deducted each month from her award of income support, etc.[378]

COUSINS criticizes this judgment, as the ECtHR normally applies another standard for assessing the justification of a differential treatment based on health status.[379] In *Glor* (not a social security case), the Court had underlined that there exists a European and universal consensus on the necessity of protecting people with a handicap against discrimination.[380] This consensus on the necessity results in the fact that the margin of appreciation for Member States to establish a differential treatment of persons with a handicap is strongly narrowed.[381] This was affirmed in *Kiss*, where the Court underlined that in case of a restriction of fundamental rights of a particularly vulnerable group in society, such as the mentally disabled, a State's margin of appreciation is substantially narrower and it must have very weighty reasons for such restrictions.[382] According to COUSINS, the ECtHR failed to address this appropriate (and more severe) standard to the *B. v United Kingdom* case.[383]

5.2.1.2.6.2 Persons suffering from HIV/AIDS

In *Kiyutin* (not a social security case), the Court needed to decide whether a Member State could refuse the grant of a residence permit because the applicant was tested positive for HIV. The Court considered that people living with HIV are a vulnerable group

[378] ECtHR 14 February 2012, *B. v United Kingdom,* 36571/06, paragraphs 54-63.
[379] M. COUSINS, "Overview of recent cases before the European Court of Human Rights and the European Court of Justice (January-March 2012)", *European Journal of Social Security* 2012, 141-143.
[380] ECtHR 30 April 2009, *Glor,* 13444/04, paragraph 53.
[381] ECtHR 30 April 2009, *Glor,* 13444/04, paragraph 84
[382] ECtHR 20 May 2010, Kiss, 38832/06, paragraph 42.
[383] M. COUSINS, "Overview of recent cases before the European Court of Human Rights and the European Court of Justice (January-March 2012)", *European Journal of Social Security* 2012, 145.

with a history of prejudice and stigmatization. Consequently, a Member State can only be afforded a narrow margin of appreciation in choosing measures constituting differential treatment on the basis of HIV status.[384]
Among other things, the Court considered that travel restrictions are instrumental for the protection of public health against highly contagious diseases with a short incubation period (e.g. cholera or "bird flu"). Such entry restrictions can help to prevent the spread by excluding travelers who may transmit these diseases by their presence in a country. However, the Court makes clear that the mere presence of a HIV-positive individual in a country is not in itself a threat to public health.[385]

Furthermore, the ECtHR notes that the Member State in question does not apply HIV-related travel restrictions to tourists, short-term visitors or nationals leaving and returning to the country. Such differential treatment between HIV-positive long-term settlers and short-term visitors could be objectively justified by the risk that the former could potentially become a public burden and place an excessive demand on the publicly-funded health care system. However, non-nationals are never entitled to free medical assistance, except for emergency treatment. Thus, whether or not a non-national obtains a residence permit in the Member State in question, he/she could never depend on the public health care system.[386]

The Court concluded that although the protection of public health constitutes a legitimate aim, the Member State was unable to show that this aim could be attained by excluding a person from residence because of his health status, namely tested positive for HIV.[387]

5.2.1.2.6.3 Conclusion: general principles

The Court has extended the protection of discrimination based on health status by narrowing the margin of appreciation of the Member States. This is because a differential treatment based on medical conditions especially affects the vulnerable groups in society, such as disabled people or persons suffering from HIV/AIDS. However, it seems that the ECtHR does not always adopt its severe proportionality in the area of social security. We will have to wait and see whether the ruling in *B. v United Kingdom* was a one-time ruling or whether the Court will continue to adopt a less strict justification test in the area of social security.

5.2.1.3 Positive action and article 14 of the Convention

Although art. 14 of the Convention does not explicitly allow Member States to take positive action, the ECtHR has recognized the possibility thereto.[388] In the *Belgium*

[384] ECtHR 10 March 2011, *Kiyutin v Russia,* 2700/10, paragraph 64.
[385] ECtHR 10 March 2011, *Kiyutin v Russia,* 2700/10, paragraph 68.
[386] ECtHR 10 March 2011, *Kiyutin v Russia,* 2700/10, paragraphs 69-70.
[387] ECtHR 10 March 2011, *Kiyutin v Russia,* 2700/10, paragraph 72.

Linguistic case, the Court recognized that Member States are frequently confronted with situations and problems which call for different solutions, especially when certain legal inequalities tend to correct factual inequalities. [389] In *Stec*, the Court even stressed that in certain circumstances a failure to correct inequality through different treatment may in itself give rise to a breach of art. 14 of the Convention.[390] Finally, in Yigit, it was reaffirmed that the provisions of the Convention do not prevent Member States from introducing legislative general policy measures which treat a specific group of individuals differently from others.[391] Although art. 14 of the Convention provides for the possibility of positive action measures, it does not oblige Member States to actually take such measures.[392]

Despite the fact that positive action measures almost always strive for a legitimate aim (i.e. the elimination of factual equalities by giving neglected groups more advantages[393]) they nevertheless constitute a difference in treatment. Therefore, the ECtHR has decided that positive measures need to be objectively and reasonably justified in the same way as other forms of differential treatment: (1) legitimate aim and (2) reasonable relationship of proportionality between the aim pursued and the means employed.[394] Some authors argue that although the same justification test is used, the Court nevertheless applies a "fair loose proportionality test".[395] This would be interesting, as the Court normally only accepts very weighty reasons for justifying a differential treatment based on nationality, gender, race, disability etc. As positive action measures will be based precisely on those grounds, it would be interesting to see whether the Court adopts a less strict scrutiny test. Therefore, we will discuss the most interesting parts of four judgments concerning positive action measures.

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[388] O.M. ARNARDÓTTIR, "Multidimensional equality from within. Themes from the European Convention on Human Rights" in D. SCHIEK & V. CHEGE (eds.), *European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law,* Abingdon, Routledge-Cavendish, 2009, 57.

[389] ECtHR 23 July 1968, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, paragraph 10 (p.31).

[390] ECtHR 12 april 2006, *Stec and others*, 65731/01 and 65900/01, paragraph 52.

[391] ECtHR 2 November 2010, *Yigit,* 3976/05, paragraph 67.

[392] O.M. ARNARDÓTTIR, "Multidimensional equality from within. Themes from the European Convention on Human Rights" in D. SCHIEK & V. CHEGE (eds.), *European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law,* Abingdon, Routledge-Cavendish, 2009, 57.

[393] G. GOEDERTIER, "Verbod van discriminatie" in *Handboek EVRM*, II, Vol. II, Antwerp, Intersentia, 2004, 152.

[394] ECtHR 23 July 1968, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, paragraph 10 (p.31); 151. G. GOEDERTIER, "Verbod van discriminatie" in *Handboek EVRM*, II, Vol. II, Antwerp, Intersentia, 2004, 151.

[395] O.M. ARNARDÓTTIR, "Multidimensional equality from within. Themes from the European Convention on Human Rights" in D. SCHIEK & V. CHEGE (eds.), *European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law,* Abingdon, Routledge-Cavendish, 2009, 68.

5.2.1.3.1 Cases

Lindsay

In *Lindsay*, the national authorities had established a difference in taxation provisions depending on whether the husband or the wife in a married couple was the sole breadwinner. When the husband was the sole breadwinner, he was entitled to a taxable allowance ("married man's allowance"), which was equivalent to one and a half times the normal single person's allowance. When the wife was the breadwinner, she was entitled to an allowance equal to a single person's allowance to set off against her earned income. Her husband would also continue to have his married-man's allowance. Since the taxation provisions treated the wife's income as accruing to her husband, a couple could therefore benefit of an extra tax allowance against their income. The applicant alleged, among other grounds, discrimination on the grounds of sex.

The Member State justified its national legislation because it had the legitimate aim of encouraging married women to work in order to advance the equality of the sexes. After all, one of the principal causes of discrimination against women has been the prejudice in the minds of men as to the capability of women to take up work. According to the Member State, such prejudice can only be broken down if more women obtain work and demonstrate that this prejudice is unjustified. The aim of extra allowance is therefore to encourage married women to work and consequently to break down unjustifiable prejudices.[396]

After the Court stated that in the field of taxation, Member States have a margin of appreciation with respect to the aims they want to pursue in this field, it accepted this positive action measure. The motivation for this acceptation, however, was very short. The Court simply stated that tax provisions which result in extra tax advantages accruing when a wife is the breadwinner of a family, can be said to fall within the margin of appreciation accorded to national authorities. Consequently, the difference in treatment had an objective and reasonable justification in the aim of providing positive discrimination in favor of married women who work.[397]

Stec and others

Stec and others concerned different pensionable ages. The Court noted that originally, these different pensionable ages were adopted in order to mitigate financial inequality and hardship arising out of the woman's traditional unpaid role of caring for the family in the home rather than earning money in the workplace. The ECtHR concluded that in the

[396] ECtHR 11 November 1986, *Lindsay,* 11089/84 found in COUNCIL OF EUROPE, *Yearbook of t he European Convention on Human Rights*, Dordrecht, Martinus Nijhoff Publishers, 1986, 110
[397] ECtHR 11 November 1986, *Lindsay,* 11089/84, COUNCIL OF EUROPE, *Yearbook of the European Convention on Human Rights*, Dordrecht, Martinus Nijhoff Publishers, 1986, 110-111.

beginning, differential pensionable ages intended to correct "factual inequalities" between men and women and appeared to have been objectively justified.[398]

The Court continued that this difference in pensionable ages can only be justified until such time that social conditions have changed, so that women are no longer substantially prejudiced because of a shorter working life. This change must in any case happen gradually. The ECtHR concluded that the use of different pensionable ages remains reasonably and objectively *justified until such time that social and economic changes remove the need for special treatment for women.* However, every Member State has a wide margin of appreciation as to the precise timing and means of putting right the inequality.[399] In this respect, the Court referred to the fact that many of the Member States still maintain a difference in the pensionable ages between men and women and to the exception provided for in art. 7 of Directive 79/7.[400] Consequently, the Court found that the positive action measure in question did not violate art. 14 of the Convention.

Runkee and White

The case of *Runkee and White* concerned two male applicants who, after their wives had died, tried to receive a widow's benefits. However, this kind of benefit was denied because a man was not entitled to such benefits. The applicants took a rather individualistic approach. They claimed that it is fundamental to the principle of equal treatment that every individual is entitled to respect as an individual, and should not be treated as a "statistical unit" on the basis of a personal characteristic, such as race or sex.[401]

The Court acknowledged that since the widow's pension was not means-tested, there was no doubt that such pension had been paid to certain widows who were less in need than individual widowers who were denied it. However, it rejected the argument of the applicant because it found that *any welfare system, in order to be workable, may have to use broad categorizations to distinguish between different groups in need.*[402]

Andrle

Finally, in *Andrle*, the applicant applied for a retirement pension. This was refused as he had not yet reached the retirement age for men. However, the retirement age for women who had taken care of their children was much lower. As the applicant had custody over

[398] ECtHR 12 April 2006, *Stec and others*, 65731/01 and 65900/01, paragraph 61.
[399] ECtHR 12 April 2006, *Stec and others*, 65731/01 and 65900/01, paragraph 66; M. COUSINS, "Overview of recent cases before the European Court of Human Rights and the European Court of Justice, and legislative and policy developments (November 2010-March 2011),", *European Journal of Soical Security*, 374.
[400] ECtHR 12 april 2006, *Stec and others*, 65731/01 and 65900/01, paragraph 63.
[401] ECtHR 10 May 2007, *Runkee and White,* 42949/98 and 53134/99, paragraph 28.
[402] ECtHR 10 May 2007, *Runkee and White,* 42949/98 and 53134/99, paragraph 39.

his children and had cared for them, he claimed that he could also retire at an earlier age. This earlier retirement was denied, as the pensionable age for men could not be lowered according to the number of children raised. Consequently, the applicant claimed discrimination based on gender.

The Court stated that pension systems constitute the cornerstones of modern European welfare systems. They are founded on the principle of long-term contributions. Unlike other welfare benefits, every member of a society is eligible to draw this benefit after reaching the pensionable age. Since the inherent features of a pension system allow for family and career planning, the Court considered that any adjustments of the pension schemes must be carried out in a gradual, cautious and measured manner. Only this way social peace, foreseeability of the pension system and legal certainty cannot be endangered.[403]

The Court further noted that the national legislation at issue was originally designed to compensate for the factual inequality and hardship arising out of the combination of the traditional mothering role of women and the social expectation of their involvement in work on a full-time basis (legitimate aim). The Court continued that today's society has changed due to social and demographic developments. However, it remains difficult to pinpoint the particular moment where the unfairness to men starts to outweigh the need to correct the disadvantaged position of women by means of affirmative action. The Court concluded that the national authorities are better placed to determine such a complex issue as it relates to economic and social policies and depends on manifold domestic variables and direct knowledge of the society. Therefore, A Member State cannot be criticized for progressively modifying its pension system and for not completing equalization at a faster pace. Consequently, the Court found no violation of art. 14 of the Convention.[404]

COUSINS remarks that in this case, the Court could have enforced its judgment by also referring to the exception of art. 7 of Directive 79/7, as it had done in *Stec and others*.[405]

5.2.1.3.2 Conclusion: general principles

This case law clearly shows that the ECtHR has adopted a positive approach to positive action measures and has attributed Member States a rather large margin of appreciation. We can summarize the Court's case law as follows:

(1) Positive action is necessary to tackle factual inequalities. A failure to correct such inequality through different treatment may even give rise to a breach of art. 14 of the Convention.

[403] ECtHR 17 February 2011, *Andrle*, 6268/08, paragraph 51.
[404] ECtHR 17 February 2011, *Andrle*, 6268/08, paragraphs 46-61.
[405] ECtHR 12 April 2006, *Stec and others*, 65731/01 and 65900/01, paragraph 63.

(2) It is up to the Member States to determine when the aim of a positive action measure is attained and the termination of the measure is required. With respect to the scope of this margin of appreciation, the Court pays a lot of attention to the (non-)existence of consensus between the Member States and to existing EU legislation.

E.g. in *Stec and others*, the existence of different pensionable ages was accepted because different pensionable ages were still used in several Member States and because Directive 79/7 allowed different pensionable ages as an exception to the principle of equal treatment between men and women. In this respect, the *Test Achats* case of the CJEU could be interesting, as this case seems to establish that the exceptions of art. 7 of the Directive cannot be upheld in present-day society. As the *Andrle* judgment of the ECtHR was pronounced on 17 February 2011, the parties and the ECtHR could not yet have taking into account the CJEU's judgment (1 March 2011). Consequently, it will not only be interesting to see whether *Test Achats* has consequences on the level of the European Union (in statutory social security), but also if it will have an impact on the case law of the ECtHR, especially because the ECtHR often refers to the "persuasive value" of the judgments of the CJEU.[406]

(3) Group based positive action seems to be accepted as welfare systems may have to use broad categorizations to distinguish between different groups in need. With this argument, the ECtHR rejected an individualistic approach of equality. This is a remarkable difference with the approach of the CJEU, where group based positive action is not self-evident and is subject to strict conditions. One could argue that the ECtHR also subjects such group based action to a justification test (i.e. legitimate aim and reasonable relationship of proportionality). However, the above discussed case law shows that this justification test is executed in a rather "lenient"[407] way.

5.2.2 Protocol no. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Art. 1 of Protocol No. 12

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as

[406] M. COUSINS, *The European Convention of Human Rights and Social Security Law,* Antwerp, Intersentia, 2008, 80.
[407] O.M. ARNARDÓTTIR, "Multidimensional equality from within. Themes from the European Convention on Human Rights" in D. SCHIEK & V. CHEGE (eds.), *European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law,* Abingdon, Routledge-Cavendish, 2009, 68, footnote 12.

those mentioned in paragraph 1.

The phrasing "the enjoyment of any right set forth by law" clearly shows that art. 1 of Protocol No. 12 establishes a general non-discrimination clause.[408] Consequently, this article can be invoked independently with respect to any right set forth by law and thus without any reference to another article of the Convention or its protocols. The applicant could refer to rights granted by national legislation, common law and international law.[409]

This protocol is the result of the aim to extend the protection against discrimination guaranteed by the Convention and the ECtHR.[410] As art. 14 of the Convention only covers the principle of non-discrimination for "rights and freedoms set forth in this Convention", there was no protection for rights which fell outside the scope of the Convention. In the field of social security, this is the case for benefits granted within the discretionary power of an administrative authority. As these benefits fall outside the scope of art. 6 (1) of the Convention and art. 1 of the First Protocol, they cannot enjoy the protection of article 14 of the Convention.

5.2.2.1 Scope of Protocol No. 12

The explanatory report clarifies that the concept "discrimination" used in Protocol No. 12 has the same meaning as "discrimination" in art. 14 of the Convention.[411] This was also affirmed by the ECtHR itself in *Sejdic and Finci.*[412] The report also reiterates that a distinction will not constitute a discrimination if it has an objective and reasonable justification. With respect to this justification, the ECtHR's case law on the scope of a Member State's margin of appreciation needs to be followed.[413]

It is interesting to see that the list of non-discrimination grounds in art. 1 of Protocol No. 12 is identical to that in art. 14 of the Convention. This is because the inclusion of other grounds is unnecessary, since the list of non-discrimination grounds is not exhaustive and the inclusion of some other grounds could lead to confusion with respect to grounds

[408] O.M. ARNARDÓTTIR, "Multidimensional equality from within. Themes from the European Convention on Human Rights" in D. SCHIEK & V. CHEGE (eds.), *European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law,* Abingdon, Routledge-Cavendish, 2009 ,53.
[409] R.C.A. WHITE & C. OVERY, *The European Convention on Human Rights,* Oxford, Oxford University Press, 2010, 568.
[410] P. LEACH, *Taking a Case to the European Court of Human* Rights, Oxford, Oxford University Press, 2011, 455.
[411] COUNCIL OF EUROPE, *Explanatory Report on Protocol No. 12*, paragraph 18, http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm
[412] ECtHR 22 December 2009, *Sejdic and Finci*, 27996/06 and 34836/09, paragraph 55.
[413] COUNCIL OF EUROPE, *Explanatory Report on Protocol No. 12*, paragraph 19, http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm

which are not included. Consequently, the protection of art. 1 of Protocol No. 12 can also be applied to grounds which are not explicitly mentioned.[414]

The explanatory report indicates in what way Protocol No. 12 will broaden the scope of protection against discrimination. Art. 1 (2) states that no one shall be discriminated against by any public authority. This second paragraph refers to situations where a person is discriminated:

(1) in the enjoyment of any right specifically granted to an individual under national law;

(2) in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;

(3) by a public authority in the exercise of discretionary power (for example, granting certain subsidies);

(4) by any other act or omission by a public authority (for example, the behavior of law enforcement officers when controlling a riot).[415]

The Protocol does not only protect individuals against discrimination by a public authority, but also in relations between private individuals which are normally regulated by law and for which a Member State has a certain responsibility. E.g.: access to services which private persons may make available to the public such as medical care.[416]

5.2.2.2 The possible impact of Protocol No. 12

5.2.2.2.1 Scope of application

A first important aspect of Protocol No. 12 is the fact that it is a freestanding article. Although the ECtHR has brought several aspects of social security under the scope of the Convention, other aspects remained to fall outside the scope. This is for example the case for benefits granted within the discretionary power of an administrative authority. Due to the enlarged scope of Protocol No. 12, individuals are now explicitly protected against discrimination by a public authority in the exercise of discretionary power. Consequently,

[414] COUNCIL OF EUROPE, *Explanatory Report on Protocol No. 12*, paragraph 20, http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm
[415] COUNCIL OF EUROPE, *Explanatory Report on Protocol No. 12*, paragraph 22, http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm
[416] COUNCIL OF EUROPE, *Explanatory Report on Protocol No. 12*, paragraph 22, http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm, 28.

disputes concerning such benefits can use art. 1 of Protocol Nr. 12 as a safety net and thus invoke the protection against discrimination.[417]

5.2.2.2.2 Assessment of a differential treatment

With respect to the assessment of a differential treatment, nothing seems to differ from the assessment according to art. 14 of the Convention. In *Sejdic anf Finci* (not a social security case), the Court needed to consider if there was a violation of art. 1 of Protocol No. 12 (after it had already decided that art. 14 of the Convention had been violated).

Firstly, the Court referred to the explanatory report to Protocol No. 12 stating that the meaning of the term "discrimination" in art. 1 of Protocol No. 12 is identical to that in art. 14 of the Convention. As the ECtHR had already decided that there was a violation of art. 14 of the Convention and that the notions of "discrimination" in both articles needed to be interpreted in the same manner, the Court concluded that there also was a breach of art. 1 of the Protocol No. 12.[418]

5.2.2.2.3 Positive action

Whereas the concept of positive action is absent in the provisions of the Convention and it was up to the ECtHR to recognize it, the preamble of the protocol explicitly states: "*reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures"*.

The explanatory report clarifies that the existence of certain groups or categories of persons who are disadvantaged or the existence of de facto inequalities may constitute justifications for adopting measures providing for specific advantages in order to promote equality.[419] It is interesting to see that this explanatory report tries to encourage positive action measures. Nevertheless, and just as the ECtHR has decided in the light of art. 14 of the Convention, (1) Member States are not obliged to take positive action measures and (2) positive measures need to be objectively and reasonably justified.[420] As the assessment of a "normal" differential treatment is the same as under art. 14 of the Convention, it is likely that the more lenient scrutiny test for positive actions measures under art. 14 of the Convention, will be similar to the scrutiny test under art. 1 of the Protocol No. 12.

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[417] K. KAPUY, "The European Convention of Human rights" in D. PIETERS, *European and International Social Security Law,* Leuven, 2011-2012, 21.
[418] ECtHR 22 December 2009, *Sejdic and Finci*, 27996/06 and 34836/09, paragraph 56.
[419] COUNCIL OF EUROPE, *Explanatory Report on Protocol No. 12*, paragraph 16 http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm
[420] COUNCIL OF EUROPE, *Explanatory Report on Protocol No. 12*, paragraph 16 http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm

5.2.2.2.4 Conclusion

For the field of social security, Protocol No. 12 will play an important role, as it also covers rights which are not explicitly guaranteed by the Convention and its protocols. With respect to the assessment of a differential treatment and its justification, no remarkable reversals are to be accepted. This is because the ECtHR's case law on art. 14 of the Convention will be applied in a manner similar to cases invoking art. 1 of the Protocol No. 12.

However, two concluding remarks[421]: (1) although the Protocol No. 12 has entered into force, only 18 Member States have ratified it. Therefore, there are still a lot of Member States where applicants cannot rely on this general non-discrimination clause. (2) We still have to wait for a social security case invoking Protocol 12, as the ECtHR has not yet pronounced itself on art. 1 of Protocol No. 12 in social security disputes.

5.3 Legal framework at the international level

The international Bill of Human Rights consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) (two optional protocols hereto) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[422] Beside these general human rights instruments, also more specific Conventions with respect to the prohibition of discrimination were created, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEAFDW) and the Convention on the Elimination of All Forms of Racial Discrimination (CEAFRD).

It is interesting to see that there is no universal definition of the concept "discrimination". Whereas the CEAFDW and the CEAFRD use a similar definition[423], the UDHR, ICCPR and ICESCR do not even present a description of the concept.[424]

Most international human rights instruments provide for some kind of control mechanism. This is often a so-called "report system", as States need to submit reports on how they have implemented the provisions of the international instruments.[425] A specific Committee will study these reports, ask questions to the States and in the end draw up a document with general observations. These Committees can also be authorized to receive inter-state complaints. For individual complaints, the State has to

[421] K. KAPUY, "The European Convention of Human rights" in D. PIETERS, *European and International Social Security Law,* Leuven, 2011-2012, 21.
[422] R.K.M. SMITH, *Textbook on International Human rights*, Oxford, Oxford University, 2012, 37.
[423] "any distinction, exclusion, restriction or preference based on race or gender which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."
[424] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 33.
[425] R.K.M. SMITH, *Textbook on International Human rights*, Oxford, Oxford University, 2012, 67.

explicitly give its consent thereto.[426] When an individual complaint is considered to be admissible, the Committee will ask the State in question to submit its observations concerning the complaint. Afterwards, the Committee will draw up a document with its conclusions and its opinion. Although the jurisdiction and jurisprudence of these Committees are limited, their importance may not be underestimated.[427]

The following frame shortly indicates the several control mechanisms of the Human Rights Committee (ICCPR), Committee on Economic, Social and Cultural Rights (ICESCR), the Committee on the Elimination of Racial Discrimination (CEAFRD) and the Committee on the Elimination of Discrimination against Women (CEAFDW).

Human Rights Committee	Established by ICCPR (art. 28)	- Reports - Inter-State Complaints - Individual Complaints - General Comments - Conclusions
Committee on Economic, Social and Cultural Rights	Established by the Economic and Social Council	- Reports - General discussion days - Field Trips - Individual petitions - Individual complaints (when the additional protocol establishing this control mechanism has enough ratifications)
Committee on the Elimination of Racial Discrimination	Established by the CEAFRD	- Reports - Inter-State Complaints - Individual Complaints - Examination of petitions
Committee on the Elimination of Discrimination against Women	Established by the CEAFDW (Art. 17)	- Reports - General - Recommendations - Individual Complaints - Grave and systematic violations

[426] R.K.M. SMITH, *Textbook on International Human rights*, Oxford, Oxford University, 2012, 67.
[427] R.K.M. SMITH, *Textbook on International Human rights*, Oxford, Oxford University, 2012, 67.

5.3.1 The Universal Declaration of Human Rights (UDHR)

Art. 2 of the UDHR

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The words "such as" and "other status" make clear that the list of prohibited grounds for discrimination is not exhaustive.[428] However, art. 2 of the UDHR is not a freestanding article, as it only covers the rights and freedoms *as set forth in the Declaration*.[429]

With respect to social security, this does not cause a great deal of problems, as art. 22 of the Declaration states: "*Everyone, as a member of society, has the right to social security […]*" and art. 25 (1) of the Declaration states: *"Everyone has the right […] to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. […]"*. It is therefore clear that social security falls under the scope of the UDHR and enjoys the protection of art. 2 of the Declaration.

The UDHR is technically not legally binding. Nevertheless, it is widely accepted as being the global opinion on human rights.[430] The UDHR strongly emphasizes the principles of equality and non-discrimination for everyone.[431] Therefore it is said that *"a prohibition on discrimination on any ground is at the foundation of the human rights policy of the United Nations"*.[432]

It was the aim to draw up a legal document which developed a more detailed description of the rights and freedoms as set forth in the UDHR. However, instead of one legal document, the General Assembly decided two draw up two covenants: one document would concentrate on the civil and political rights (ICCPR), whereas another would concentrate on economic, social and cultural rights (ICESCR).[433] Both Covenants replace the provisions of the UDHR to the extent that the Covenants provide for a legally binding option.[434]

[428] S. SMIS, C. JANSSENS, S. MIRGAUX & K. VAN LAETHEM, *Handboek Mensenrechten. De internationale bescherming van de rechten van de mens,* Antwerpen, Intersentia, 2011, 530.
[429] S. SMIS, C. JANSSENS, S. MIRGAUX & K. VAN LAETHEM, *Handboek Mensenrechten. De internationale bescherming van de rechten van de mens,* Antwerpen, Intersentia, 2011, 530.
[430] R.K.M. SMITH, *Textbook on International Human rights*, Oxford, Oxford University, 2012, 37.
[431] R.K.M. SMITH, *Textbook on International Human rights*, Oxford, Oxford University, 2012, 40.
[432] R.K.M. SMITH, *Textbook on International Human rights*, Oxford, Oxford University, 2012, 40.
[433] R.K.M. SMITH, *Textbook on International Human rights*, Oxford, Oxford University, 2012, 43.
[434] R.K.M. SMITH, *Textbook on International Human rights*, Oxford, Oxford University, 2012, 43.

5.3.2 The International Covenant on Civil and Political Rights (ICCPR)

Article 2 of the ICCPR:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 of the ICCPR also limits the scope of the protection against discrimination to the rights recognized or enunciated in the Covenant. As the ICCPR only covers civil and political rights, disputes in the area of social security fall outside the scope of art. 2 of the ICCPR.

However, art. 26 of the same Covenant provides for a more general non-discrimination clause.

Art. 26 of the ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

As the Human Rights Committee (HRC) can receive individual complaints (communications) and the scope of art. 26 is not limited to the rights guaranteed by the ICCPR itself, this article can have great significance for social security cases. After all, the Committee on Economic, Social and Cultural Rights (CESCR), being the guardian of the rights and freedoms guaranteed in the ICESCR, only provides for a *report system* where States need to submit reports on how they have implemented the provisions of the international instruments.[435] The Committee will study these reports, ask questions to the States and in the end, a document with general observations will be drawn up.

Up until today, the ECSCR cannot deal with individual complaints. This might change in the near future, as the Optional Protocol to the International Covenant on Economic,

[435] R.K.M. SMITH, *Textbook on International Human rights*, Oxford, Oxford University, 2010, 65.

Social and Cultural Rights is tabled for ratification. Among other things, this protocol provides for an individual complaint procedure. Already eight States have ratified it. However, in order to enter into force, a ratification by ten states is necessary (art. 18 Optional Protocol). Consequently, and in expectation of the entry into force of the Occupational Protocol, it is interesting to see whether social security cases could rely on the protection provided for in art. 26 of the ICCPR.

5.3.2.1 The applicability of Article 26 of the ICCPR to the area of social security

The applicability of art. 26 of the ICCPR to the area of social security was discussed by the HRC in the *Broeks* case. The applicant, a married woman, was not entitled to continued unemployment benefits under the Dutch Unemployment Benefits Act. An exception was made if she could prove that she was the breadwinner or that she was permanently separated from her husband.[436] As this condition did not apply to married men, she considered this regulation as discriminatory under art. 26 of the ICCPR.

The government argued that art. 26 of the ICCPR could only be invoked in the sphere of civil and political rights. Consequently, a government can envisage the admissibility of a complaint concerning discrimination in the field of taxation, but it cannot accept the admissibility of a complaint concerning the enjoyment of economic, social and cultural rights. According to the Government, the latter category of rights is the object of a separate United Nations Covenant. As the applicant's complaint relates to rights in the sphere of social security, the ICESCR is applicable. The Government concluded that the ICESCR has its own specific system and its own specific organ for international monitoring of how States parties meet their obligations and deliberately does not provide for an individual complaints procedure.[437]

The HRC notes that art. 26 of the ICCPR does not merely duplicate the guarantees already provided for in art. 2 of the same Covenant. On the contrary, it derives from the principle of equal protection of the law without discrimination, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities.[438]

The Committee continues that art. 26 of the ICCPR does not contain any obligation with respect to the matters that may be provided for by legislation. Consequently, it does not require that a Member State enacts legislation to provide for social security. However, when such legislation is adopted in the exercise of a Member State's sovereign power, this must comply with art. 26 of the Covenant.[439]

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[436] http://www.un.org/womenwatch/daw/cedaw/protocol/cases.htm (consultation: 14/06/2012).
[437] HRC 9 April 1987, *Broeks,* 172/1984, paragraph 8.3.
[438] HRC 9 April 1987, *Broeks,* 172/1984, paragraph 12.3.
[439] HRC 9 April 1987, *Broeks,* 172/1984, paragraph 12.4.

Finally, the HRC concludes that what is at issue is not whether or not social security should be progressively established in a Member State, but whether the legislation providing for social security violates the prohibition against discrimination contained in art. 26 of the ICCPR and the guarantee given therein to all persons regarding equal and effective protection against discrimination.[440]

The HRC's broad interpretation of the scope of art. 26 of the ICCPR was affirmed in two other social security cases: *Zwaan de Vries* and *Vos*.[441] Also General Comment No. 18 explicitly states that art. 26 of the Convention establishes an "autonomous right" prohibiting "discrimination in law or in fact in any field regulated and protected by public authorities".[442]

5.3.2.2 Prohibition of discrimination and possible justifications

The ICCPR does not provide for a definition of the concept discrimination. However, General Comment No. 18 made clear that discrimination occurs in the case of "any distinction, exclusion, restriction or preference which is based on any ground such as race, color sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[443]

Both direct and indirect discrimination are prohibited. Indirect discrimination refers to a rule or measure that "may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons" having a particular race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[444]

A differential treatment will not constitute discrimination (1) when the Covenant itself allows differential treatment or (2) when the difference in treatment can be objectively and reasonably justified.[445]

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[440] HRC 9 April 1987, *Broeks,* 172/1984, paragraph 12.5.
[441] HRC 9 April 1987*, Zwaan de Vries,* 182/1984, paragraphs 12.3-12.5; HCR 29 March 1989, *Vos, 218/1986,* paragraphs 11.2-11.3.
[442] Office of the High Commissioner for Human Rights, General Comment No. 18, Non-discrimination, October 1989, paragraph 12.
[443] Office of the High Commissioner for Human Rights, , General Comment No. 18, Non-discrimination, October 1989, paragraph 7.
[444] HRC 12 April 2004, *Derksen*, 976/2001 paragraphs 3.1-3.3; HRC 8 August 2003, *Althammer* et al, 998/2001, paragraph 10.2.
[445] Office of the High Commissioner for Human Rights, General Comment No. 18, Non-discrimination, October 1989, paragraph 13. Affirmed in HRC 9 April 1987, *Danning*, 180/1984, paragraph 13.

5.3.2.2.1 Differential treatment imposed by the ICCPR itself

Art. 6 (5) of the ICCPR:

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

Art. 10 (3) of the ICCPR:

The penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

These articles of the Covenant prescribe themselves a differential treatment of juvenile offenders and pregnant women in particular circumstances.[446] As the Member States need to guarantee the rights of the Covenant, they will have to observe the imposed differential treatments of art. 6 (5) and 10 (3) of the Covenant. Consequently, these differences in treatment will never be considered as discriminatory.

5.3.2.2.2 Justification of a differential treatment

If the criteria for the distinction are objective and reasonable and the aim pursued is legitimate under the Covenant, the difference in treatment will not constitute a discrimination.[447] Whether or not a distinction is reasonable and objective heavily depends on the right to which discrimination is being claimed and the ground for discrimination invoked.[448]

With respect to the prohibited grounds for discrimination, a distinction based on the grounds of gender and race is more difficult to justify.[449]

With respect to discrimination in the area of social security, we will shortly discuss some social security cases brought before the HRC.

[446] Office of the High Commissioner for Human Rights, General Comment No. 18, Non-discrimination, October 1989, paragrapgh 13.
[447] Office of the High Commissioner for Human Rights, , General Comment No. 18, Non-discrimination, October 1989, paragraph 13.
[448] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 48.
[449] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 48.

5.3.2.2.2.1 Cases

5.3.2.2.2.1.1 Gender

Broeks

In *Broeks*, the applicant was a married woman and in order to receive her continued unemployment benefits, she had to prove that she was a "breadwinner". For a married man in the same situation, this condition did not exist. The applicant alleged a discrimination based on sex.

The HRC simply stated that the differentiation appeared on the grounds of sex, placing married women at a disadvantage compared with married man. The applicant was denied a social security benefit on an equal footing with men and this differentiation could not be considered reasonable. Consequently, art. 26 of the ICCPR had been violated.[450]

Vos

In *Vos*, the applicant received a disability allowance until the death of her husband, because she then became entitled to a payment under the Member State's General Widows and Orphans Act. Under the latter, she received a lower amount per month. The applicant alleged discrimination based on sex, as a disabled man whose wife dies retained the right to a disability allowance.

The Member State explained that a social security system needs to ensure that individuals do not qualify for more than one benefit simultaneously under different social insurance acts, when each such benefit is intended to provide a full income at subsistence level. Therefore, several provisions exist to govern entitlements for the eventuality of overlapping entitlements.[451]

The HRC decided that the unfavorable result complained of by the applicant simply follows from the application of a uniform rule to avoid overlapping in the allocation of social security benefits. This rule is based on objective and reasonable criteria, especially as both statutes under which the applicant qualified for benefits aimed at ensuring to all persons (who satisfied the entitlement criteria) a subsistence level income. Therefore, the Committee did not found a violation of art. 26 of the ICCPR.[452]

[450] HRC 9 April 1987, *Broeks,* 172/1984, paragraphs 14-15. The same was judged in the similar case HRC 9 April 1987*, Zwaan de Vries,* 182/1984, paragraphs 14-15.
[451] HCR 29 March 1989, *Vos, 218/1986,* paragraphs 8.8.
[452] HCR 29 March 1989, *Vos, 218/1986,* paragraphs 12.

5.3.2.2.2.1.2 Sexual orientation

Young

In *Young*, the applicant was in a same-sex relationship for 38 years. His partner was a war veteran, for whom the author cared in the last years of his life. After his death, the applicant applied for a pension under the Veteran's Entitlement Act as being a veteran's dependent. The authorities however denied the applicant's application because he could not be considered as a dependent because "partner" in the Act was defined as "a person of the opposite sex". The applicant alleged a discrimination based on sexual orientation.

The HRC referred to an earlier judgment, which stated that "the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation".[453] The Committee also recalled its other jurisprudence, which stated that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences.[454]

The Committee continued that the Veteran's Entitlement Act determines that persons who are part of a married couple or of a heterosexual cohabiting couple (who can prove that they are in a "marriage-like" relationship) fulfill the conditions for receiving pension benefits. The Committee noticed that in this case, the applicant did not have the possibility of entering into marriage or being recognized as a cohabiting partner (under the Veteran's Entitlement Act) because of his sex or sexual orientation.[455]

The HRC concluded that the Member State could not provide any arguments or justifying factors on how the distinction between same-sex partners (excluded from pension benefits) and unmarried heterosexual partners (granted such benefits), is reasonable and objective. Consequently, the Committee found that the denial of a pension to the applicant on the basis of his sex or sexual orientation constituted a violation of art. 26 of the ICCPR.[456]

Joslin

In *Joslin*, the applicants, who were engaged in a lesbian relationship, alleged a discrimination based on sex and indirectly based on sexual orientation, because their Member State did not provide for a homosexual marriage.

The Committee found that as article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry, any claim that this right has been violated must

[453] HRC 31 March 1994, *Toonen*, 488/1992, paragraph 8.7.
[454] HRC 6 August 2003**,** *Young*, 941/2000, paragraph 10.4
[455] HRC 6 August 2003**,** *Young*, 941/2000, paragraph 10.4.
[456] HRC 6 August 2003**,** *Young*, 941/2000, paragraph 10.4.

be considered in the light of this provision. The HRC explained that the use of the term "men and women", has been consistently and uniformly understood as indicating that the treaty obligation of Member States is only to recognize marriage between a man and a woman. Therefore, the Committee decided that the refusal of a Member State to provide for marriage between homosexual couples did not violate the rights of the ICESCR.[457]

Despite this judgment concerning same-sex marriage, the HRC has stated in a consideration that it would welcome legislative steps relating to the registration of partnership of the same sex.[458]

5.3.2.2.2.1.3 Marital status

Snijders

In *Snijders*, a compulsory nation-wide insurance for costs of long-term medical care discrimination was funded out of contributions which were being levied by the State's tax department. Further, a contribution was imposed on persons benefitting from this insurance. With respect to the personal contribution, the applicants, who were single, had to pay an income-related contribution for their stay in a nursing home, whereas married persons or persons who cohabit and whose partner is not also hospitalized or in a nursing home, only paid a minimal non-income-related contribution.

The HRC underlined that personal contributions should be calculated objectively and without arbitrariness. The Court repeated the Member State's explanation that the distinction in contribution is based upon the factual difference that married or cohabitating persons leave behind a partner who continues to live in what was their common household and therefore does not save the same amount of money as a single person does in residential care. For this reason, married or cohabiting couples were requested to pay a fixed contribution.

The Committee considered that this distinction was objective and reasonable, as it was based on the factual circumstances of life of persons benefiting from the scheme. Therefore, this differential treatment did not constitute a violation of art. 26 of the Covenant.[459]

Derksen

The applicant in *Derksen* had signed a cohabitation contract with her male partner. He was the breadwinner and she ran the household and had a part-time job. After her partner had died (on 22 February 1995), the applicant claimed benefits under the

[457] HRC 17 July 2002, *Joslin*, 902/1999, 8.2-8.3.
[458] Human Rights Council, 4 November 1993, Consideration of reports submitted by the State Parties: Norway, CCPR/C/79/Add.27, paragraph 7.
[459] HRC 27 July 1998, *Snijders*, 651/1995, paragraph 8.4.

Member State's General Widows and Orphans Act. The benefits for half-orphans were included in the widows' benefits. The grant of these benefits was refused because the applicant had not been married to her partner and therefore she could not be recognized as widow under the Widows and Orphans Act. On 1 July 1996, the Surviving Dependents Act replaced the General Widows and Orphans Act entitling also unmarried partners to benefit.

The applicant applied again for a benefit. Again, the benefits were refused, because only those who were entitled to a benefit under the General Widows and Orphans Act on 30 June 1996 and those who became widow on or after 1 July 1996 were entitled to a benefit under the new Surviving Dependents Act.

The applicant claimed that she had been a victim of discrimination. Not because the General Widow and Orphans Act had refused the benefit because she was not married, but because the new legislation allowing benefits for unmarried partners, was limited to surviving partners whose partner had died after 1 July 1996. The applicant argued that once a Member State decides to treat married and unmarried partners equally, this should apply to all, regardless of the date of the death of the partner. The same goes for half-orphans whose parent died before 1 July 1996, whether the parents were married or not.[460]

The HRC started its judgment by repeating its earlier case law that a differentiation between married and unmarried couples does not violate art. 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the cohabitating persons.[461] In this case, taking into account that the past practice of distinguishing between married and unmarried couples did not constitute a prohibited discrimination, the Committee decided that the Member State was also not obliged to make the new legislation retroactive.[462]

However, with respect to benefits for half-orphans, the Committee came to another conclusion. It observed that under the earlier legislation, the children's benefits depended on the status of the parents. Consequently, if their parents were unmarried, children were not eligible for the benefits. However, under the new legislation, benefits are being denied to children born to unmarried parents before 1 July 1996, while those are granted to similarly situated children born after that date. The Committee considered that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. The HRC concluded that there was a violation of art.

[460] HRC 12 April 2004, *Derksen*, 976/2001 paragraphs 3.1-3.3.
[461] HRC 9 April 1987, *Danning*, 180/1984, paragraph 14.
[462] HRC 12 April 2004, *Derksen*, 976/2001 paragraph 9.2.

26 of the Covenant in respect of the applicant's child as she was refused half orphan's benefits through her mother.[463]

In this respect, the HRC has consistently held that differential treatment between children born in wedlock and those born out of wedlock needs to be abolished.[464]

5.3.2.2.2.2 Conclusion: general principles

Besides the cases discussed above, it has been noticed that HRC is very careful with respect to pronouncing a discrimination in the area of welfare benefits. Consequently, the criteria for a differential treatment in this area will easily be considered as reasonable and objective.[465] Also, with respect to limited or non-retroactive remedies of existing discrimination in national social security, the Committee seems to be reluctant to pronounce a violation of art. 26 of the ICCPR.[466] Moreover, whenever the HRC did find a violation of art. 26 of the ICCPR in the area of social security, this was most of the time already acknowledged by the Member State, which was already preparing or enacting new legislation.[467]

A differential treatment between married and unmarried couples does generally not amount to discrimination.[468] The fact that a Member State does not provide for same-sex marriages does not violate the Covenant. However, the HRC does encourage Member States to open civil partnerships to same-sex couples.

The HRC has ranged several other prohibited grounds for discrimination under the concept "other status": nationality, descent, place of residence, age, health status, etc.[469] However, the ground of "sexual orientation" is not considered as falling under "other status". It is included in the prohibited ground of "sex".

5.3.2.3 Positive action

Although the concept of positive action is not even explicitly mentioned in the Covenant, General Comment No. 18 states that the principle of equality sometimes requires

[463] HRC 12 April 2004, *Derksen*, 976/2001 paragraph 9.3.
[464] Human Rights Committee, *Concluding observations: Luxemburg*, 15 April 2003, CCPR/CO/77/LUX, paragraph 9. For references to other concluding observations of the HRC see W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 127.
[465] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 47.
[466] See e.g. HRC 19 July 1994, *Pepels*, 484/1991.
[467] E.g. HRC 9 April 1987, *Broeks,* 172/1984, paragraphs 16; W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 47.
[468] HRC 9 April 1987, *Danning*, 180/1984, paragraph 14.
[469] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 131.

Member States to take positive action measures in order to "diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant".[470] Whereas on a European level positive action is only encouraged but never imposed, the HRC clarifies that such action sometimes may be mandatory.[471]

A positive action measure may result in a preferential treatment of one specific category of the population. This preference must however be limited in time.[472] With respect to the justification of a differential treatment due to a positive action measure, the HRC demands a reasonable and objective justification where a lot of attention is paid to the principle of proportionality. However, this justification test does not seem to be conducted in a severe way. After all, General Comment No. 18 states that as long as the positive action measures are necessary in order to correct a factual discrimination, they must be considered as legitimate differentiations under the Covenant.[473] An interesting case in this respect is *Jacobs*.

Jacobs

In *Jacobs*, the applicant claimed that the introduction of a gender requirement (i.e. four non-justice seats in each college need to be reserved for women and four for men) made it impossible to carry out the required comparison of the qualifications of candidates for the High Council of Justice of the Member State in question. The applicant could not accept that this condition resulted in a rejection of candidates with better qualifications in favor of others whose only merit was that they met the gender requirement.[474]

The Committee referred to art. 25 (c) of the Covenant stating that every citizen shall have the right and opportunity to have access, on general terms of equality, to public service in his or her country. In order to ensure access on general terms of equality, the criteria and processes for appointment must be objective and reasonable. The HRC therefore acknowledges that it must determine whether the introduction of a gender requirement constitutes a violation of art. 25 of the Covenant or of other provisions of the ICCPR concerning discrimination by virtue of its discriminatory nature. Is there any valid justification for the distinction made between candidates on the grounds that they belong to a particular sex?

[470] Office of the High Commissioner for Human Rights, General Comment No. 18, Non-discrimination, October 1989, paragraph 10.
[471] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 222.
[472] Office of the High Commissioner for Human Rights, General Comment No. 18, Non-discrimination, October 1989, paragraph 10.
[473] Office of the High Commissioner for Human Rights, General Comment No. 18, Non-discrimination, October 1989, paragrapgh 10.
[474] HRC 30 July 2004, *Jacobs*, 943/2000, paragraph 3.3.

In the first place, the Committee noted that the aim of the gender requirement was to increase the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there. According to the HRC, this revealed a need to encourage women to apply for public service and the need for taking measures in this regard. The Committee found that the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of law, could well be understood as requiring that perspective to be included in a body involved in judicial appointments. Consequently, the HRC could not decide that the gender requirement was not *objective and reasonably justifiable*.[475]

Secondly, the Committee pointed out that the gender clause in question only requires at least four applicants of each sex among the 11 non-justices appointed, i.e. just over one third of the candidates selected. Therefore, the HRC finds that this requirement does not amount to a *disproportionate* restriction of access to public office.

Based on these (and some other) considerations, the HRC found that the gender requirement had an objective and reasonable justification.[476]

We can conclude that the HRC seems to heavily support positive action measures, as it acknowledges that Member States are sometimes even obliged to take such measures. A reasonable and objective justification where a lot of attention is paid to the principle of proportionality is asked. However, this justification test does not seem to be conducted in a very severe way.

5.3.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)

Art. 2(2) of the ICESCR:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Also, the ICESCR guarantees the prohibition of discrimination in art. 2 (2). This article lists several prohibited grounds for discrimination. Nevertheless, this list is not exhaustive. General Comment No. 20 of the Committee on Economic, Social and Cultural Rights (CESCR) clarifies that the list has a mere illustrative character: the listed grounds do not represent the entire scope of the protection and differential treatment based on one of the grounds listed does not unconditionally lead to a discrimination.[477]

[475] HRC 30 July 2004, *Jacobs*, 943/2000, paragraph 9.4.
[476] HRC 30 July 2004, *Jacobs*, 943/2000, paragraph 9.5.
[477] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 15.

Art. 2 (2) of the Covenant is not a free-standing article, as it only *protects the rights enunciated in the present Covenant*. With respect to social security, this does not cause many problems, as art. 9 of the ICESCR explicitly recognizes social security, including social insurance. Because art. 9 of the Covenant is of importance for social security disputes concerning discrimination, we will first discuss the meaning of "the right to social security".

5.3.3.1 Article 9 of the ICESCR: the right to social security

General Comment No. 19 of the Committee on Economic, Social and Cultural Rights is dedicated to the clarification of the right to social security.

The right to social security covers "the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents".[478]

Phrased in a more negative way, art. 9 of the ICESCR provides for "the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies".[479]

Art. 9 of the Covenant obliges Member States to take the necessary measures in order to ensure the right to social security to everyone. These measures could include contributory or insurance-based schemes, non-contributory schemes or other forms of social security such as privately run schemes, community-based or mutual schemes and self-help measures.[480]

Participation in and information on a national social security system is important in order to fully realize the right to social security. One the one hand, this implicates that beneficiaries of social security benefits are able to participate in the administration of a social security system. On the other hand, information entitlement to social security benefits need to be provided in a clear and transparent way.[481] In short, a Member State's legislation, policies, programs and allocation of resources must facilitate the

[478] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, November 2007, paragraph 9.
[479] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, November 2007, paragraph 4.
[480] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, November 2007, paragraph 4.
[481] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, November 2007, paragraph 26.

access to social security for all members of its society.[482] These policies or programs could differ according to geographic features (rural and deprived urban areas) or linguistic and other minorities.[483]

5.3.3.2 Prohibition of discrimination and possible justifications

5.3.3.2.1 The concept of discrimination

General Comment No. 19 clarified that the Covenant *"prohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security".*[484]

At the moment, it is not possible to bring individual complaints to the Committee on Economic, Social and Cultural Rights. However, this might change in the near future, as an Optional Protocol to the ICESCR is put up for ratification. Art. 2 of this Protocol states that communications may be submitted by or on behalf of individuals or groups of individuals, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. The case law that will be developed through this individual complaint procedure will give the Committee the chance to elaborate on the issue of non-discrimination.

The ICESCR demands the elimination of discrimination both in a formal and a substantial way. Avoiding *formal discrimination* implicates that a Member State's legislation and policy documents do not discriminate based on the prohibited grounds.[485] E.g. social security legislation may not deny social security benefits to women based on their marital status. Eliminating *substantive discrimination* demands for measures to prevent, diminish and eliminate the factors which cause discrimination in practice.[486] The combat against this kind of discrimination will mostly focus on categories of the population who suffer historical of persistent prejudice.[487]

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[482] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, November 2007, paragraph 30.
[483] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, November 2007, paragraph 49.
[484] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, November 2007, paragraph 29.
[485] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 8.
[486] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 4.
[487] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 9.

Art. 2 (2) of the ICESCR must be interpreted as prohibiting both direct and indirect discrimination. *Direct discrimination* will occur "when an individual is treated less favorably than another person in a similar situation for a reason related to a prohibited ground of discrimination".[488]

Indirect discrimination implies "laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination".[489] Discrimination can occur due to an action or omission by Member States, and their institutions and agencies on a national or local level.[490]

5.3.3.2.2 Prohibited grounds of discrimination

Art. 2 (2) lists the following prohibited grounds for discrimination: race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Contrary to its general comments, the Committee pays little attention to issues of discrimination in its concluding observations (except for discrimination based on gender).[491] Therefore, the discussion of the several grounds for discrimination is rather limited.[492]

In general, the Council has underlined that a Member State needs to pay special attention to several categories of the population who have traditionally been struggling to exercise the rights to social security. Examples are women, sick or injured workers, people with disabilities, minority groups, etc.[493]

5.3.3.2.2.1 Gender

With respect to gender, the Council clarifies that the concept of "sex" has evolved over time: it does not merely cover physiological characteristics, but also social constructions of cultural stereotypes, prejudices and expected roles creating a hindrance to the full realization of equality in social security.[494] Especially, the persistence of a traditional

[488] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 10.
[489] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 10.
[490] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 14.
[491] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 135.
[492] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 135.
[493] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, November 2007, paragraph 31.
[494] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 20; Committee on Economic, Social and Cultural Rights, *Concluding observations: Chile,* 26 November 2004,

male-dominated society is detrimental to gender equality.[495] The following examples are given: refusing to hire a woman because she might get pregnant or allocating part-time work to women because they are unwilling to commit to their work as much time as men.[496]

The combination of art. 9 of the Covenant and art. 3 (the equal right of men and women to the enjoyment of all economic, social and cultural rights) obliges Member States to equalize the compulsory retirement age for both men and women, to ensure that women receive the equal benefit of public and private pension schemes, to guarantee adequate maternity leave for women, paternity leave for men, and parental leave for both men and women.[497]

5.3.3.2.2.2 National or social origin

The Committee has ranged the issues regarding minority groups under the prohibited ground of discrimination based on national or social origin.[498] Observations on discriminations of specific groups concerned among others Arabs in Israel, Roma people and indigenous people.[499] Strangely enough, the Committee has ranged discrimination based on ethnicity under "other status" instead of under "national or social origin".[500]

With respect to indigenous people and minority groups, General Comment No. 16 warns the Member States to not exclude these categories of the population in a direct or indirect way. Such discriminations could occur due to entitlement criteria which are difficult (for these categories) to fulfill.[501] Also language barriers can result in an indirect discrimination, as this could lead to a lack of access to information.[502]

E/C.12/1/Add.105, paragraph 15; W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 136.

[495] Committee on Economic, Social and Cultural Rights, *Concluding observations: Dominican Republic,* 12 December 1997, E/C.12/1Add.16, paragraph 15; W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 136.

[496] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 20.

[497] Committee on Economic, Social and Cultural Rights, General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights, May 2005, paragraph 26.

[498] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 139.

[499] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 139.

[500] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 144-145.

[501] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, November 2007, paragraph, 35.

[502] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 21.

5.3.3.2.2.3 Birth

The Committee heavily opposes to discrimination between children born out of wedlock and those born in wedlock.[503] Such discrimination can occur on a legal, social or institutional level.[504] E.g. discrimination as regards the curtailment of inheritance and nationality rights.[505] The Committee has also often condemned Civil Codes who maintained a difference between "legitimate" and "natural" children.[506]

5.3.3.2.2.4 Other status

The Committee has given a broad interpretation to the concept of "other status".[507] The concept concerns additional grounds, which mostly affect social groups who are vulnerable.[508] Examples of these additional grounds are disability, age, marital status, sexual orientation and gender identity, health status, economic and social situation, etc.

Disability

The prohibition of discrimination based on disability applies both to mental disabled and physical disabled persons.[509] In this respect, the Committee has already expressed its concerns about persisting discrimination against persons with physical and mental disabilities, especially in terms of employment, social security, education and health.[510]

Age

In General Comment No. 6, the Committee needed to decide whether discrimination on the basis of age was prohibited by the Covenant, as neither the ICESCR nor the UDHR explicitly refer to age as one of the prohibited grounds. A possible solution would be to range "age" under the concept of "other status". However, the Committee decided that it

[503] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 140.
[504] Committee on Economic, Social and Cultural Rights, *Concluding observations: Japan,* E/C.12/1/Add.67, 24 September 2001, paragraph 14; W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 140.
[505] Committee on Economic, Social and Cultural Rights, *Concluding observations: Japan,* E/C.12/1/Add.67, 24 September 2001, paragraph 14.
[506] Committee on Economic, Social and Cultural Rights, *Concluding observations: Luxemburg*, 5 December 1997, E/C.12/1/Add.22, paragraph 12; Committee on Economic, Social and Cultural Rights, *Concluding observations: Uruguay*, 22 December 1997, E/C.12/1/Add.18, paragraph 13.
[507] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 140.
[508] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 27.
[509] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 141.
[510] Committee on Economic, Social and Cultural Rights, *Concluding observations: China*, 13 May 2005, E/C.12/1/Add.107, paragraph 16.

was not yet possible to conclude that age discrimination is comprehensively prohibited by the Covenant.

Nonetheless, the CESCR underlined that the range of matters in relation to which such discrimination can be accepted, is very limited. Moreover, discrimination against older persons is underlined as being unacceptable in many international policy documents and is confirmed in the legislation of the vast majority of States. In the few areas in which discrimination continues to be tolerated (e.g. mandatory retirement ages or access to tertiary education), there is a clear trend towards the elimination of such barriers. Therefore, the Committee concluded that States parties should seek to expedite this trend to the greatest extent possible.[511]

In this respect, the Committee has already expressed its concerns when a Member State's legislation did not yet cover the prohibition of age discrimination.[512]

Nationality and place of residence

The Committee has expressed its concerns with respect to discrimination against migrant workers in the field of economic, social and cultural rights.[513] Especially when social insurance benefits are not accorded to non-national workers and these workers are accordingly put on an unequal footing with national workers with respect to the right to social security.[514]

Also differential treatment of persons who reside in different geographical areas can constitute a discrimination under the Covenant.[515]

Marital status and sexual orientation

The Committee has acknowledged that both marital status and sexual orientation are prohibited grounds for discrimination falling under the concept of "other status".[516] Consequently, it has already pointed some Member States to the necessity of creating

[511] Committee on Economic, Social and Cultural Rights, General Comment No. 6, *The economic, social and cultural rights of older persons*, December 1995, paragraphs 11-12.
[512] Committee on Economic, Social and Cultural Rights, *Concluding observations: China*, 13 May 2005, E/C.12/1/Add.107, paragraph 78; Committee on Economic, Social and Cultural Rights, *Concluding observations: Trinidad and Tobago*, 5 June 2002, E/C.12/1/Add.80, paragraph 14.
[513] Committee on Economic, Social and Cultural Rights, *Concluding observations: Kuwait*, 7 June 2004, E/C.12/1/Add.107, paragraph 13.
[514] Committee on Economic, Social and Cultural Rights, *Concluding observations: Kuwait*, 7 June 2004, E/C.12/1/Add.107, paragraph 40; Committee on Economic, Social and Cultural Rights, *Concluding observations: Iraq*, 12 December 1997, E/C.12/1/Add.17, paragraph 17.
[515] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 144.
[516] Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, August 2000**,** paragraph 18; Committee on Economic, Social and Cultural Rights, General comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights, August 2005, paragraph 5 and 10.

legislation which prohibits such kind of discrimination.[517] It is interesting to see that, in contrast with the HRC, the CESCR has not ranged "sexual orientation" under the concept of "sex".

Health status/HIV

The Committee has ranged health status under the concept of "other status". Consequently, it has encouraged Member States to enact legislation which prohibits discrimination based on health status, and more specifically with respect to HIV/AIDS.[518]

In this respect, the International Guidelines on HIV/AIDS and Human Rights of 2006 need to be mentioned. The fifth guideline pays specific attention to anti-discrimination law. It asks Member States to enact or revise general anti-discrimination law to people who suffer from HIV/AIDS and are often faced with discrimination. Such legislation should include, among others, the areas of health care, social security and welfare benefits.[519]

5.3.3.2.3 Possible justifications of discrimination

A differential treatment might not constitute a discrimination if two conditions are fulfilled[520]: (1) the aim and effects of the measure are legitimate. This implicates that the measures are in conformity with the rights of the Covenant and their purpose is to promote general welfare in the Member State's society. (2) A reasonable relationship of proportionality between the means employed and the aim pursued. If these conditions are fulfilled, the difference in treatment is objectively and reasonably justified and does not violate art. 2 (2) of the Covenant.

The Council has already clarified that a failure to eliminate a discrimination because of a lack of resources does not constitute an objective and reasonable justification "unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority".[521]

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[517] Committee on Economic, Social and Cultural Rights, *Concluding observations: China*, 13 May 2005, E/C.12/1/Add.107, paragraph 78; Committee on Economic, Social and Cultural Rights, *Concluding observations: Trinidad and Tobago*, 5 June 2002, E/C.12/1/Add.80, paragraph 14.
[518] Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, August 2000**,** paragraph 18; Committee on Economic, Social and Cultural Rights, *Concluding observations: Trinidad and Tobago, 5 June 2002*, E/C.12/1/Add.80, paragraph 14.
[519] The Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights,* 2006, 31.
[520] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 13.
[521] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 13.

5.3.3.3 Positive action

General Comment No. 20 does not only clarify that Member States sometimes need to adopt positive measures in order to eliminate substantive discrimination and to accelerate the achievement of equality, it also underlines that the Member States are sometimes under the obligation to do so.[522] Positive measures are necessary to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others.[523] Consequently, they can improve the de facto position of women.[524]

The Committee explains that such measures are acceptable under the Covenant (1) if they consist of reasonable, objective and proportional means and (2) if they are temporary.[525] This last condition implies that the measures will be abolished when substantive equality is finally realized. Nonetheless, the Committee itself states that in exceptional cases positive action measures can even have a permanent character.[526]

The types of positive action used by the Member States (i.e. quota systems, specific benefits etc.) fall within their margin of appreciation.[527] However, the Committee has established that both the nature, duration and application of positive measures should be designed with reference to the specific issue and context.[528]

In footnote 9 of General recommendation No. 16, the Committee makes an important exception to the principle that positive action measures (satisfying the above mentioned conditions) are not discriminatory: "reasons specific to an individual male candidate may tilt the balance in his favor, which is to be assessed objectively, taking into account all criteria pertaining to the individual candidates. This is a requirement of the principle of proportionality".[529] This exception recalls the case law of the CJEU in the Marshall case ("saving clause").

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[522] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 9.
[523] Committee on Economic, Social and Cultural Rights, General comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights, August 2005, paragraph 15.
[524] Committee on Economic, Social and Cultural Rights, General comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights, August 2005, paragraph 35.
[525] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraphs 9 and 12.
[526] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 9.
[527] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 239.
[528] Committee on Economic, Social and Cultural Rights, General comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights, August 2005, paragraph 36.
[529] Committee on Economic, Social and Cultural Rights, General comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights, August 2005, footnote 9.

According to VANDENHOLE, the CESCR has already favored affirmative action with respect to disabled people, women, indigenous people, (ethic) minorities and disadvantaged groups.[530] The same author however states that the Committee has not yet developed a clear policy on when affirmative action is recommended and in favor of which categories of a population.[531]

5.3.3.4 Conclusion

The non-discrimination provision of the ICESCR prohibits both formal and substantive discrimination and both direct and indirect discrimination. However, a differential treatment will not constitute a discrimination when (1) the aim and effects of the measure are legitimate and when (2) there is a reasonable relationship of proportionality between the means employed and the aim pursued. A lack of resources will never constitute an objective and reasonable justification "unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority".[532]

Contrary to its general comments, the Committee pays little attention to issues of discrimination in its concluding observations (except for discrimination based on gender).[533] VANDENHOLE even states that the CESCR has not yet fully explored the potential of the principle of non-discrimination in the field of economic, social and cultural rights.[534] The entry into force of the Optional Protocol (with the individual complaints procedure) might incite the Committee to the further development of this principle.

Positive action measures are acceptable under the Covenant (1) if they consist of reasonable, objective and proportional means and (2) if they are temporary. Nonetheless, the Committee itself states that in exceptional cases positive action measures can even have a permanent character. There is one exception to the principle that positive action measures (satisfying the above mentioned conditions) are not discriminatory: "reasons specific to an individual male candidate may tilt the balance in his favor, which is to be assessed objectively, taking into account all criteria pertaining to the individual candidates. This is a requirement of the principle of proportionality".[535] This exception recalls the case law of the CJEU in the Marshall case where legislation

[530] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 239.
[531] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 240.
[532] Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, May 2009, paragraph 13.
[533] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 135.
[534] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 146.
[535] Committee on Economic, Social and Cultural Rights, General comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights, August 2005, footnote 9.

allowing automatic and preferential treatment was only accepted when the candidates were equally qualified and there was a “saving clause”.

The CESCR has already favored affirmative action with respect to disabled people, women, indigenous people, (ethic) minorities and disadvantaged groups. However, a clear policy on when affirmative action is recommended and in favor of which categories of a population has not yet been developed. The entry into force of the Optional Protocol (with the individual complaints procedure) might incite the Committee to also further develop its policy on positive action.

5.3.4 The Convention on the Elimination of All Forms of Discrimination against Women (CEAFDW)

5.3.4.1 Prohibition of discrimination and possible justifications

Art. 2 of the CEAFDW:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women.

The CEAFDW aims to eliminate all forms of discrimination against women on the basis of sex by guaranteeing equal recognition, enjoyment and exercise of all human rights.[536]

Art. 1 of the same Covenant clarifies that the term "discrimination" needs to be interpreted as being "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

Both direct and indirect discrimination are prohibited. The Committee notes that direct discrimination occurs when a differential treatment is explicitly based on gender, whereas indirect discrimination occurs when a law, policy, program etc. appears to be neutral but nevertheless has a greater disadvantage on women.[537]

5.3.4.2 Positive action

Article 4 (1) of the CEAFDW:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

The Committee on the Elimination of Discrimination against Women has elaborated on art. 4 (1) of CEAFDW in its General recommendation No. 25.[538]

The purpose of art. 4 (1) of CEAFDW is to take measures in order to accelerate the achievement of de facto or substantive equality of women. The Committee underlines these "temporary special measures" (positive action measures) may not only give an equal start to women, but must also empower women to achieve equality of results.[539] Therefore, non-identical treatment is sometimes necessary.[540]

[536] Committee on the Elimination of Discrimination against Women, General recommendation No. 28, December 2010, paragraph 4.
[537] Committee on the Elimination of Discrimination against Women, General recommendation No. 28, December 2010, paragraph 16.
[538] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004.
[539] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 8.
[540] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 8.

Interestingly, the Committee does not consider positive action measures as exceptions to the principle of non-discrimination. On the contrary, it states that these measures "are part of a necessary strategy by States parties".[541] Therefore, Member States are obliged to adopt positive action measures if they are necessary and appropriate in order to accelerate the achievement of de facto or substantive equality of women in a specific area or in general.[542]

Moreover, a failure to take positive action measures needs to be adequately explained. The absence of positive action measures cannot be justified by a predominant market or political forces.[543] Finally, the Committee even incites Member States to include in their national legislation (even in their Constitutions) provisions which allow taking positive action measures.[544]

The concept "temporary special measures"

The Committee carefully explains the concept of "*temporary special measures"*.[545]

The term "special" simply indicates that the positive action measures are taken to serve a specific goal.

"Measures" refers to a variety of regulatory instruments, policies and practices. Examples given by the Committee are "outreach or support programs, allocation and/or reallocation of resources, preferential treatment, targeted recruitment, hiring and promotion, numerical goals connected with time frames, and quota systems".

The use of "temporary" indicates that the maintenance of positive action measures will not be necessary for ever. However, this does prevent measures which are being upheld for a long time. The Committee underlines that the duration of positive action measures needs to be considered in the light of their functional result in responding to a concrete problem. If a positive action has attained its goal (the achievement of de facto or substantive equality of women in a specific area), it must be terminated.[546]

[541] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 18.
[542] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 24.
[543] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 29.
[544] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 31.
[545] See Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 20-22.
[546] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 20.

"Necessary and appropriate"

A Member State can only take positive action measures if it can show that they are necessary and appropriate under the circumstances.[547] Consequently, the potential impact of the measures needs to be evaluated and the measures need to be designed and applied taking into account the specific national context and against the background of the specific nature of the problem which the measures intend to overcome.[548] In the light of this evaluation, they need to choose the most appropriate measures to attain the goal pursued.

The Committee asks Member States to explain why they have chosen one kind of measure before another. Also the link between positive action measures and more general measures in order to improve the position of women must be clarified.

5.3.4.3 Conclusion

The prohibition of discrimination under the CEAFDW covers both direct and indirect discrimination. "Discrimination" in the CEAFDW refers to "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

Positive action measures seem to play an important role in order to attain full equality of women. Contrary to the CJEU, not only equality of opportunities, but also equality of results is being striven for. But most importantly, where both the CJEU and the ECtHR consider a positive action measure as a derogation to the principle of equal treatment, the Committee on the Elimination of Discrimination against Women is of the opinion that these measures "are part of a necessary strategy by States parties".[549]

Consequently, whereas on the level of the EU and the Council of Europe positive action measures are judged very strictly, this judgment is much less strict for the CEAFDW. Moreover, as positive action is seen as being part of a necessary strategy, the Committee even underlines that Member States are obliged to adopt positive action measures if they are necessary and appropriate in order to accelerate the achievement of de facto or substantive equality of women.

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[547] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 265; Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 39.
[548] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 33.
[549] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, on temporary special measures, 2004, paragraph 18.

5.3.5 The Convention on the Elimination of All Forms of Racial Discrimination (CEAFRD)

5.3.5.1 Prohibition of discrimination and possible justifications

Art. 2 of the CEAFRD:

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

Art. 1 of the CEAFRD describes “discrimination” as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. The list of the fields in which the human rights need to be guaranteed is not exhaustive.[550]

The other paragraphs of art. 1 CEAFRD indicate that the Convention does not apply to the distinctions made by Member States between citizens and non-citizens and that the Convention does not affect in any way the legal provisions of Member States concerning

[550] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, *The meaning and the scope of special measures*, 2009, paragraph 9.

nationality, citizenship or naturalization (on the condition that these provisions do not discriminate against any particular nationality).

The Committee on the Elimination of Racial Discrimination clarifies that not every differential treatment constitutes discrimination. If the criteria for the distinction are applied to pursue a legitimate aim and are proportional to achieve that aim, the differential treatment will not constitute a discrimination.[551] Later on, the Committee referred to an "objective and reasonable justification for differential treatment".[552]

5.3.5.2 Positive action

Art. 2 (4) of the CEAFRD[553]:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

These "special measures" refer, among others, to positive action measures. The nature of positive action measures can vary from regulatory instruments, policies, to local programs at every level.[554] Member States are even asked to implement themselves in their national legislation provisions allowing to take positive action measures.[555]

The purpose of a positive action is placing the beneficiaries with respect to economic, social and cultural rights on an equal footing with the rest of the population.[556] The Committee clarifies which conditions special measures, such as positive action

[551] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, *The meaning and the scope of special measures*, 2009, paragraph 8.
[552] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 38.
[553] Art. 2 of the CEAFRD states: "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case en tail as a con sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved". This article obliges Member States to take special measures "when the circumstances so warrant".
[554] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, *The meaning and the scope of special measures*, 2009, paragraph 13.
[555] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, *The meaning and the scope of special measures*, 2009, paragraph 13.
[556] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 208.

measures, need to satisfy: they "should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary".[557] The measures need to be assessed in the light of need and the current situation of the individuals and communities concerned.[558]

The phrasing "shall not be deemed racial discrimination" underlines that positive action measures taken in the light of this article shall not constitute discrimination.[559] The Committee even emphasizes that positive action measures are not exceptions to the principle of non-discrimination. They are essential in the Convention's project to eliminate racial discrimination and to achieve effective equality.[560]

Positive action measures need to be limited in time: they will be discontinued when the objectives for which they were taken have been achieved. The Committee clarifies that this implicates that the measures are functional and goal-oriented. Consequently, the continuation of a positive action measure shall be considered in respect of its objective, the means employed and the results. [561]

According to VANDENHOLE, targeted groups for positive actions have been black people, disadvantaged of less-developed groups, vulnerable or disadvantaged ethnic and tribal groups or ethnic minorities, Roma people, etc.[562]

5.3.5.3 Conclusion

The CEAFRD provides for an own definition of discrimination: "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". The list of the fields in which the human rights need to be guaranteed is not exhaustive.

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[557] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, *The meaning and the scope of special measures*, 2009, paragraph 16.
[558] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, *The meaning and the scope of special measures*, 2009, paragraph 16; Office of the High Commissioner for Human Rights, General Recommendation No. 30, Discrimination against Non Citizens, 2004, paragraph 4.
[559] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, *The meaning and the scope of special measures*, 2009, paragraph 20.
[560] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, *The meaning and the scope of special measures*, 2009, paragraph 20.
[561] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, *The meaning and the scope of special measures*, 2009, paragraph 27.
[562] W. VANDENHOLE, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies,* Antwerp, Intersentia, 2005, 210.

Not every differential treatment constitutes discrimination. If the criteria for the distinction are applied to pursue a legitimate aim and are proportional to achieve that aim, the differential treatment will not constitute a discrimination.

Positive measures are explicitly allowed in art. 2 (4) of the CEAFRD. Nonetheless, they need to satisfy several conditions: they should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The latter implies that the measures are functional and goal-oriented and that they will be discontinued when the objectives for which they were taken have been achieved.

Also the Committee on the Elimination of Racial Discrimination emphasizes that positive action measures are not exceptions to the principle of non-discrimination. They are essential in the Convention's project to eliminate racial discrimination and to achieve effective equality.[563]

Targeted groups for positive actions have been black people, disadvantaged or less-developed groups, vulnerable or disadvantaged ethnic and tribal groups or ethnic minorities, Roma people, etc.

[563] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, *The meaning and the scope of special measures*, 2009, paragraph 20.

6 Conditionality

6.1 Introduction

The key question in this chapter is “what actions can be imposed upon a person qualifying for a benefit (fulfilling the legally set conditions) in order to actually benefit from the schemes?" To what extent does the law limit the possibility to subject the beneficiary of social programs to the duty to take up certain actions in order to actually benefit from the programs? It goes without saying that this aspect is, yet again, an aspect that is of great importance to the possible application of the RightServicing concept.

However, like it was the case in the previous chapters, we again see ourselves forced to highlight several possible difficulties that might occur.

First of all, we will give a general outline of the concept of "conditioning of social security benefits". Afterwards, we will focus on the aspect of "contractualization" of social security benefits. Finally, we will terminate our dissertation on this subject with a case law study of the judgments pronounced within the framework of several important social rights conventions as there are: the International Covenant on Economic, Social and Cultural Rights, the European (Revised) Social Charter, the ILO Convention 102 and the European Code of Social Security.

6.2 Chalking out the characteristics of “conditionality of social security benefits”

When discussing the conditionality of social security, we do not aim at the qualification conditions, but rather at the actions the socially protected must undertake in order to obtain or maintain the social benefits he is entitled to. We thus aim at those actions imposed upon the beneficiary of social programs so he can actually benefit from them. These may be administrative actions, such as applying for a benefit, filing some forms etc. These actions may also relate to containing or reducing the social risk covered, such as when rehabilitation measures are being imposed or for instance the actions aimed at promoting one’s employability.

In this first section, we further define this “conditioning for desirable behavior/action”. We will do so by answering the following questions: what typifies these conditions? To what extent can we consider this conditioning as belonging to the traditional “qualifying conditions” on the basis of which persons are entitled to social security benefits? What kinds of action/behavior is being aimed at? Does this conditioning of the required action belong to certain types of social security schemes (social assistance schemes, unemployment schemes, etc.)?

6.2.1 Belonging to the traditional qualifying conditions?

Conditioning the entitlement to benefits is typical for social security. Persons are not entitled to benefits simply because they fall in the personal scope of a given scheme. One also has to fulfill certain conditions to become entitled to a benefit and/or to remain entitled: "Falling within the personal scope of application of social security laws is only the first step towards entitlement to benefits. The second step is the fulfillment of the concrete entitlement criteria of a social security law."[564]

Traditionally, one can think of conditions such as the fulfillment of qualifying periods and waiting periods, the payment of the (required amount of) social insurance contributions, and requirements related to the national labour market. Especially in relation the last type of entitlement conditions, we come across examples of conditioning of desired behavior, which is the type of conditioning we are interested in from the perspective of RightServicing. The conditioning of behavior is then often stipulated in relation to (the desired integration into) the labour market. We can think of the condition of making oneself available to the labour market, of looking for work, of accepting offered work, of (re)training in order to learn the necessary skills to become employed more easily.

When the person does not perform the desired action, he may be sanctioned, for instance by suspending temporarily, partially or sometimes even completely and indefinitely the payment of the benefit. Very often, the conditions are further "fine-tuned" in terms of the nature of the work or the level of (re)training that is deemed still to be acceptable for the person on benefit. In other words, a person will not be forced to accept whatever kind of work or vocational training; the unemployed or indigent citizen is to accept "suitable" work or training. What is considered to be "suitable" can then differ across the several social security systems or even across the social security schemes.

Traditionally, this kind of conditioning is to be found back in unemployment insurances and more generally in social assistance schemes. Yet, more and more often it is being introduced in work incapacity schemes: the temporarily or partially incapacitated citizen must accept and perform work that he can be expected to do from a medical point of view. Under incapacity for work schemes, the availability requirement also exists in a negative form: the incapacitated national worker must not be unavailable for work for reasons other than sickness or injury. It is not the intention of these schemes to support people who are incapable of work for other reasons, such as old age or being abroad. The eventual scope of coverage will thus very much depend on the way one defines sickness and injury.

The entitlement conditions can thus be divided into traditional qualification conditions and conditions that relate to the action that is to be undertaken.

[564] K. KAPUY, *The social security position of irregular migrant workers. New insights from national social security law and international law*, Cambridge-Antwerp-Portland, Intersentia, 2011, 647.

The first ones traditionally refer to insurance records and/or time periods that the beneficiary needs to complete. It refers to (minimum) periods of insurance, residence, labour, etc. that need to be fulfilled to open entitlement or to conditions shaping the rights to a minimum and/or a reduced benefit in case the required standard record is not achieved.

Next to this first category, there are the conditions on the behavior/action that is required to open entitlement or to maintain entitlement. Traditionally, these are referred to as labour market conditions that are often present in unemployment schemes and social assistance schemes: by this we understand conditions stipulating that the beneficiary should be available for the labour market; that he should be actively looking for work; that the beneficiary should follow appropriate training so that his chances of employability would increase, etc. Yet conditions that aim at desired action/behavior can go beyond the mere traditional labour market conditions.

Examples can be the conditioning of the payment of child care benefits to the actual school attendance of the children (see e.g. Romania) or to the enrollment of the child in an educational program (especially when there is no school attendance duty after a certain age). In some systems, birth grants are (still) conditional upon the (actual) birth registration. More recently, the ideas to link health care coverage and payment of child care benefits to the condition that the beneficiary upholds a healthy life style, are growing more popular (in policy plans) in many Western European systems. Also in the administration of social security we find examples where beneficiaries have to act in a certain way before receiving the benefit: beneficiaries have to fill out (electronic) forms, they often need to register at the competent authorities or have to provide the necessary information to the authorities in order to assess the risk and the appropriate action to be undertaken. When not doing this properly, they risk to lose their benefit in the end. Also, in personal budget schemes in which the beneficiary is granted a budget enabling him to buy in the necessary (social) services from licensed providers, conditioning in relation to required action/behavior is often present. The budget is then granted on condition that the beneficiary performs the required action.

Modalities of payment and description of conditions are often materialized on the basis of a mutual contract between the administration (or representative body of the administration) and the beneficiary. Although it is not exclusively linked to personal budget schemes, contracts are often used as a tool for conditioning the access to the benefit.

Conditioning entitlement on the basis of preferred action/behavior is definitely a key component in alternative social programs addressing poverty, which are constituted in addition to and/or parallel to existing formal social security schemes. Very often, these can be found in emerging economies where formal social security systems are not always reaching out to all residents, and in particular to the most needy groups of society.

Especially the populations living and/or working in the informal society are not (always fully) covered by the traditional social insurance systems. For them, countries develop alternative social programs where "conditioning of behavior" takes a central position. The functioning of such programs is often based on so called "conditional cash transfers" (or *CCT*s). These CCTs are designed as social protection programs that transfer cash based on the premise that households – typically those with children and young family members – will use health, education or other services that policymakers consider of public interest[565]. FAJTH and VINAY define CCTs as programs "based on a multidimensional perspective of poverty reduction, broadening the development impact of growth report"[566]. As they report in their article: "[t]he number of people who benefit from these programs in the developing world is already quite large, making CCTs a valued tool for fighting poverty and generating support for reforms. For example, CCTs such as the *Bolsa Familal* in Brazil and *Oportunidades* in Mexico cover approximately 12 and 5 million families respectively with relative modest budgets (less than 0.5% of GDP)".

The idea is to develop social security programs that offer more extensive coverage to poor and vulnerable populations that in reality stay out of the ambit of the formal statutory social security systems. "CCTs have, indeed, been a major tool for implementing the World Bank's social protection strategy […]"; but more recently they "also have been included in the Social Protection Floor initiative of the UN system, which aims to secure a minimum level of access to essential services and income security for people in the context of current crisis and beyond"[567]. CCTs are definitely beyond the stage of mere experimental pilots. They are very much integrated into many social (security) programs in Latin America, the United States (in states such as New York and Washington), Africa (such as Ghana, Nigeria, South-Africa and Zambia), Southeast and Central Asia (Indonesia, Pakistan and Turkey) and even in (Central and Eastern) Europe (Romania). They do not replace existing social security systems (if already in place), yet traditionally complement them in reaching out to groups that are traditionally left out of the scope of protection of social security schemes.

They can often be considered as new types of social assistance schemes (or social welfare schemes) and regularly work on the basis of a "contract" stipulating the rights and duties of the benefit provider and the beneficiary (see more about this below). In return for benefits, beneficiary households are expected to meet one or more pre-specified conditions, such as school enrolment and regular school attendance, participation in parents-teachers meetings, compliance with national immunization plans,

[565] G. FAJTH and C. VINAY, "Conditional Cash Transfers: A Global perspective", *MDG Insights* 2010, 1.
[566] Ibidem.
[567] ILO, *The social protection Floor Initiative: Manual and strategic framework for joint UN country operations*, 2009, Geneva paraphrased upon by G. FAJTH and C. VINAY, "Conditional Cash Transfers: A Global perspective", *MDG Insights* 2010, 1.

participation in bimonthly checkups for pregnant women, as well as other similar human development-centered public interventions.

L. RODRIGUEZ outlines some typical characteristics of the CCTs. These cash transfer schemes are defined as "(i) market based interventions aimed towards internalizing an externality in which (ii) a number of payment receptors are identified in a targeting exercise to (iii) receive a payment or reward in kind if (iv) they fulfill a set of conditions". On the basis of experiences in developing countries[568], the following set of criteria, typical to CCTs, is outlined:

- Interventions designed to match individual decisions with social preferences internalizing direct and learning externalities mainly in the areas of education and health.

  The CCT is a policy intervention that aims at correcting market failures under provision of a valuable social service by adjusting the individual's behavior through economic incentives. In CCT programs, interventions targeting poor populations are designed to match individual households' decisions on investment in human capital with wider social preferences, mainly in the areas of education and health.

  It is argued that an increase in education or health by an individual generates positive benefits on others. These positive externalities are not rewarded by market forces, therefore, it is expected that poor households under-invest in human capital from a social optimum perspective.

- Target to increase payment efficiency (Main criteria: poverty and vulnerability)
  - Geographic
  - Household target

  Geographic targeting is relatively simple to administer, as different areas are ranked by some indicative measure relevant to either CCT intervention, e.g. infant mortality rates, education levels, access to water or electricity. Resources are then allocated in proportion to their expected impacts. Hence, in terms of CCT, regions with poorer human capital indicators tend to receive higher per capita transfers.

  At the household level, CCT programs use different poverty or social categorization target approaches: however, the use of a proxy means test is the preferred option to select payment receptors when it is not possible to

[568] The article compares schemes for environmental protection (payments for environmental services or "*PES*") with CCTs: L. RODRIGUEZ, U. PASCAL, R. MURADIAN, N. PAZMINO and S. WHITTEN, "Towards a unified scheme for environmental and social protection: Learning from PES and CCT experiences in developing countries", *Ecological Economics*, 2011, 2163-2174.

directly observe the actual income of payment receptors. The Mexican CCT program *Opportunidades* uses the proxy means test to classify households from previously identified geographic areas as eligible for treatment ("poor") or ineligible ("non-poor") based on information collected from socio-economic surveys.
• Financed by public funds from tax revenues and international lending from donors. Private parties can participate from the supply side, as well as providers of education and health services.
• Payment covers the direct costs of sending children to school or to medical checkups, and the child income lost due to school attendance rather than working.
• Cash or in kind payments: regarding the CCT, the amount of transfer is generally associated with the depth of poverty being addressed. CCT linked to education: cash transfers ought to cover the incremental costs of education for the household. What is actually transferred is the actual costs of sending children to schools, which involves school fees, supplies and transport, plus the opportunity cost of their time (i.e. foregone income by children).
• Payment frequency is regular and predicable, designed to reduce entry barriers towards the use of education and health systems. For example, the payment receptors of the Colombian CCT-program *Familias en Acción* receive a bi-monthly payment for ensuring that a child achieves at least 80% of school attendance. In order to reduce the entry barriers for children education, one third of the bimonthly allowed benefit is retained in a savings account that families cannot access until a week before enrolment for the next school year.
• Payments contribute to safety nets and mitigate risks.
• Conditions designed to adjust individual behavior to match socio-economic objectives of the society. The rationale for including conditionalities (also known as co-responsibilities) is to compel individuals to adjust their behavior towards the desired program's goals. By imposing conditions or co-responsibility, policy makers provide incentives to households to take actions that they would not ordinarily take on their own.
• Design includes mechanisms to verify compliance and define sanctions.

Conditionalities can become costly to monitor and verify.[569] They can be constrained by the capacity of the agencies to put them into practice.

* Source: L.C. RODRIGUEZ et. al. *Ecological Economics,* 70, 2011, 2164-2166.

Can we consider CCTs as proper social security schemes? Most of the CCT-schemes came into place when traditional social security schemes did not function properly. They have been designed as an alternative or a complement to the deficient running "default" system. Hence, one would be inclined to answer the question in a negative manner.

CCTs mainly target (extreme) poor populations that, for various reasons, are living in informal society and hence are not addressed by the traditional formal structures of social security. Moreover, the conditionality is designed to stimulate proper or desired behavior that, strictly speaking, lies outside the strict scope of social security: mainly education and public health. The latter is done as it is believed that poverty should be addressed in a multifaceted way, and not alone by cash transfers. In other words, access to good education and public health are important factors to keep people out of poverty.

Yet, looking at the traditional components of traditional social security, there are quite some similarities to draw. CCTs address a typical social security risk. CCT-benefits – whether they are of a cash or of an in kind nature – are granted to persons who face a lack of subsistence due to poverty. The risk that is addressed belongs to traditional social security (see articles 9 and 11 International Covenants economic, social and cultural rights and article 13 of the European Social Charter).

Furthermore, the benefits are granted through a public (statutory) scheme, outlining rights and duties of the involved parties and based upon a certain degree of redistribution (solidarity). More questionable is the element of individual entitlement: in CCTs it is not so much the poor individual that, on the basis of an individual means test, is entitled to a benefit. CCTs often work on the basis of family units that are, on the basis of a proxy means test, most likely to be considered as "poor". Moreover, the benefit entitlement and the condition fulfillment are described in terms of different persons: e.g. when children regularly attend school, the benefit is granted to the head of the family and/or the person representing the children.

Another element pinpointing against the true social security character of these schemes is the reason for their introduction: namely, the failure of the traditional social security schemes to reach the persons in need. As most of the targeted beneficiaries live in the informal sector, they will most likely not qualify for social security from the outset. Due to their illegal residence or labour, they are not able to fulfill the basic conditions in relation to the personal scope or in relation to the qualification for entitlement. As these persons,

[569] See extensively about this: A. FISZBEIN and N. SCHADY, *Conditional cash transfers: reducing present and future poverty*, Washington D.C., The World Bank, 2009, 89 ff.

by definition, breach these basic conditions, they cannot be entitled to any of the benefits of the applicable social security system. Often? CCTs find their "raison d'être" in breaking through this vicious circle.

However, is this enough to become disqualified from social security? As to the targeted person, there are many examples of social assistance schemes where the entitlement criteria are described in relation to the family unit. From the examples given above, we noticed as well that traditional social security schemes also experiment with conditionality in relation to the desired action or behavior, including or behavior of third persons.

The fact that the scheme finds its origin in the deficiency of the traditional social security system to reach its objectives should neither be given too much weight. A counterargument could be that just because of this reparative function? the complementary scheme should be considered as belonging to social security. In a similar manner, social welfare schemes do address some shortcomings of traditional social security schemes (social assistance, care,…) as they go further than the traditional benefits by tailoring the benefit to the concrete needs of the beneficiary. By doing so, one aims at a better integration of the beneficiary in the society. The provision of cash benefits alone cannot always reach this objective. Integration of persons sometimes needs a multifaceted approach where cash benefits and tailored services need to be combined. CCTs try to achieve an outcome (combat of poverty) by approaching the social problem in a multifaceted way (cash transfer, education and good health). For a good understanding, they are not designed to substitute traditional social security arrangements, such as health care insurance or pension schemes. CCTs therefore need to be positioned in the wider contexts and needs of a society and within the overall social policy or protection framework of a country.[570]

As we do with social welfare schemes, CCTs can be considered to belong to the social security, at least when we accept a broad understanding of this concept. Considering CCTs as part of social security in the broad sense of the concept will have some legal consequences. One of these consequences concerns the international standards of social security: one can now argue that what is stipulated here in relation to "conditioning" social security entitlement, is likewise to be applied on schemes complementary to social security.

6.2.2 Nature of the actions? Possible categorization?

In the examples given above, we have noticed that conditioning of behavior in traditional social security mainly boils down to labour market conditions: the conditioning of behavior is then often stipulated in relation to (the desired action which hypothetically

[570] G. FAJTH and C. VINAY, "Conditional Cash Transfers: A Globan perspective", *MDG Insights* 2010, 2.

leads to the integration into) the labour market. They are typically found in unemployment schemes, social assistance schemes and sometimes in work incapacity schemes. Yet, more recent examples show a linkage to desired action/behavior in education (school registration, school attendance, ...), public health (medical check-ups, vaccinations and even healthy life style) or registration with authorities (birth registration).

CCTs often aim at proper action in educational registration and public health, yet labour market goals are also sometimes to be found. Examples of targeted objectives in the schemes reviewed by RAWLINGS[571]:

- Increase the educational attainment of school-age poor children and reduce current and future poverty (*Bolsa Escola*);
- Eradicate the worst forms of child labour (i.e. those involving a health risk), while increasing educational attainment and reducing poverty (*PETI*);
- Increase the human capital investment among extreme poor families and serve as a social safety net (*Familias en Acción; Red de Protección Social*);
- Increase educational attainment, and improve health outcomes and thus reduce poverty (*PATH*; *PROGRESA*).

Due to their multi-faceted approach, CCTs are considered to be more efficient than traditional social assistance schemes when it comes to the combat of long-term poverty reduction and human capital accumulation. Traditional social assistance programs mainly focus upon current and short-term poverty[572]. Yet, as already mentioned before, they do not have the potential to replace or take over existing social security schemes. They are to be considered as a useful complement to the social security schemes designed around the more traditional segments of population of industrialized societies.

6.2.3 Belonging to certain types of social security schemes?

From the examples above, we could learn that "conditioning behavior" is traditionally present in relation to unemployment and social assistance schemes, but more recently, it is also finding its way in schemes dealing with work incapacity, health care and family protection (child care in particular). We also find it in the administration of social security (file procurement). In CCTs, it is one of the core elements in the design of the scheme. In other words, categorizing conditioning in relation to types of schemes is difficult to do. It is potentially omnipresent in social security.

[571] L. B. RAWLINGS, "A new approach to social assistance: Latin America's experience with conditional cash transfer programmes", *International social security association Review*, vol. 58, 2005, (133), 136-137.
[572] L. B. RAWLINGS, "A new approach to social assistance: Latin America's experience with conditional cash transfer programmes", *International social security association Review*, vol. 58, 2005, (133), 139.

Conditioning the action/behavior is on the other hand often found in schemes where administrations do enjoy some freedom (discretionary powers) to manage the entitlement. To the same token, in these schemes the element of contracting as tool to outline the conditions is very much present as well. Further on, more will be said about contracting and the use (as well as the limits) of discretionary powers with regard to the design of the entitlement conditions. Here it can be mentioned from the outset, that when administrations are given some freedom to design the entitlement conditions, this is always to be done within the boundaries of a legal framework in which the design of conditioning can take place. First of all, the administrative unit is to be empowered by the competent authority (government, parliament, etc.). The empowerment also includes the scope of action (what can be done, in what fields, etc.). The discretionary power is not to be understood as the possibility to do whatever seems appropriate in the view of the administration.

Discretionary power cannot be put on par with the absence of control over the use of their competence. In this respect, the notion of pseudo-legislation was developed in a number of countries: when administrative bodies operate along a certain line of conduct in the use of their discretionary competence, they can only deviate from that particular line of conduct if they have good reasons to do so (legal certainty). It will also be checked whether the equality principle has not been violated and that there is no random deviation from the general code of conduct. Here as well, the filling out of this conditioning should be done within certain legal limits (pseudo-legislation: code of conduct).

6.3 Contractualization in the element of conditionality

Conditionality in relation to desired action or behavior is often materialized through contracts. This is especially true in CCTs, but also growingly taking place in traditional social assistance and unemployment schemes. The question is whether these contracts can be considered as “genuine” civil law contracts, based upon contractual freedom of the involved parties (administration and beneficiary) or whether it is rather a new kind of labeling the entitlement conditions.

Where schemes make a benefit conditional upon action by the protected person, one may ask whether law imposes limits on what can be asked of the beneficiaries in counterpart of the benefits. What is the true legal meaning of so-called contractual obligations? In social security programs use is increasingly made of the contractual institution. This is especially true in the social assistance and social welfare schemes, but also in the more traditional social insurance schemes in relation to work incapacity and unemployment, where we see that contracts are used to “fine-tune” the conditions of the protected person and the institutions administrating the benefit.

We have seen the introduction of these “contracts” in various countries over the past decade. Some underpinning examples follow. In the United Kingdom, an unemployed

person needs, in order to get his/her jobseeker's allowance, to sign a "jobseeker's agreement" specifying the type of work sought and the actual steps to be taken to look for work and to improve the chances of finding a job[573]. The French unemployment benefit scheme was rephrased in 1991 as a scheme of benefits helping a person to return to work.[574] The applicant for a benefit has to sign a "plan for the help to return to work", in which the rights and duties of both the unemployment administration and the unemployed person are said to be determined. This is accompanied by the signing of a project of personalized action in which the various measures to help that specific person finding a job are enumerated. Still in France, contractualization had already entered the scene earlier within the framework of the social assistance, more specifically the Minimum Integration Income.[575] During an initial period of social assistance of 3 months, a "contract" is proposed by the authorities, which includes a plan for integration. The integration need not necessarily be aimed at paid employment, since training or an apprenticeship are equally valid objectives. The act even allows for the drawing up of a more social integration program, for example aimed at alphabetizing or combatting alcoholism. If the claimant does not fulfill his obligations under the contract, the benefit will be terminated.

Apart from these, many other examples can be found throughout Europe. Also with regard to CCTs, the contracting of the entitlement conditions is often applied in practice.

Using a contract to sharpen the entitlement conditions would better responsibilize the socially protected person: it would more easily bring him/her towards the behavior/action desired by the administration (i.e. aiming at a more swift integration into the labour market and/or society). The contract would serve as a tool for fine-tuning the space left by the legislator when conditioning the concerned social benefits. Especially in the field of social assistance benefits and welfare benefits, some playing field is left at the discretion of the administrating authorities to fill out the conditioning and the eventual benefit of the scheme. The idea is that the compensation or service to be granted should be made "tailor fit" to the specific needs of the protected person. What is concretely needed to make a person finally fit for integration into society and labour market, may differ somewhat from person to person. A contract may be a perfect tool to materialize the tailor made approach, clearly outlining the rights and obligations adapted to the specific needs of the protected person.

[573] The agreement contains the following elements: the name of the beneficiary, the number of hours and agreed patterns that the beneficiary is available for, any possible restrictions on the availability, a description of the type of work that the beneficiary is looking for, the action that the beneficiary will take to seek employment and to improve the chances of finding employment, the length of any permitted period during which the beneficiary restricts the availability to work in line with the usual occupation he/she had so far and/or to the level of pay he/she used to receive, a statement of the rights of appeal in case the beneficiary disagrees with the contents of the agreement and the date of the agreement. The agreement is in writing and is signed by the employment officer and the beneficiary.
[574] ARE – Allocation d'aide au retour à l'emploi.
[575] RMI – Revenu minimum d'intégration.

These so-called “contracts” or “agreements” deserve more attention of the lawyers, also in a comparative perspective. Are they really “contracts” governed by the civil law on contracts? At the end of the day, a contract is concluded between two (or more) parties and is characterized by the fact that the involved parties have a freedom to (not) come to an agreement. This freedom of contracting is also materialized in the process of bargaining on the possible conditions to be incorporated in the agreement. Parties have the freedom to make a proposal and/or a counterproposal; to accept and/or decline what is proposed by the other party. The question is to what extent these characteristics are present in the contract we encounter in the “conditioning of social security schemes”. Is the tool here used to further condition the rights and obligations of the social protected person, to be considered as a real contract pertaining to the domain of civil law; or are we simply dealing here with the final processing of shaping the entitlement conditions by the administration, as one of the actors within the public law domain? Are they what could be called “administrative contracts”? Or maybe a “sui generis” contract? Can we find a difference between types of contracts used? If so, does it say something about the nature of the contract? And does it have consequence as to the types of conditions that can be stipulated?

To answer the question whether or not we are dealing with a genuine contract (in the civil law sense of the word) we will examine the following elements:

- Contractual freedom: to what extent are the parties free to make a contract and to draw up the contents of the contract?
- The relationship between the parties: to what extent do contractual parties stand in an (un)equal relationship?
- The legal source of the sanction: when contracts are breached by (one of) the parties, what sanctions can be taken and on the basis of which legal source can this sanction be justified?

6.3.1 Contractual freedom

What in fact are the basic features of a contract? How can we define a contract? Is there a common legal definition available? Most legal systems have a definition in place, yet it is so openly stipulated that that there is “ample room for manoeuvre”[576]. Although definitions may differ between legal systems, as well as the concrete interpretations of the concept of contract, there are some common characteristics present. In EICHENHOFER and WESTERVELD’s[577] contribution on the relevance of the contract in employment services, we can read the following:

[576] E. EICHENHOFER and M. WESTERVELD, “Contractualism: a legal perspective”, in E. SOL and M. WESTERVELD, *Contracutualism in employment services*, The Hague, Kluwer, 2005, (21), 27.
[577] Ibidem.

- "A contract is a means to establish between persons or institutions social relations that did not exist before" (based upon the definition by YEATMAN[578] in the context of contemporary contractualism); or
- "A contract is a product of a consent which creates legal ties between persons who were not connected with one another before (based upon the definition by KÖTZ and FLESSNER[579])".

In essence, contracts are about the creation of legal rights between parties that were not legally connected with each other before on the matter at hand. Something is made between the two parties that previously did not exist. The latter thus refers to the split of the provider and purchaser which becomes united through the contract. A core element is the freedom of contract. This freedom is expressed in:

- The freedom to contract (the party can decide to contract or not);
- The freedom to choose the contracting party (in case one decides the contract);
- The freedom to stipulate the contents of the contract, in deliberation with the other involved party. In joined agreement one stipulates the terms (rights and obligations) and one reaches consensus over these terms. If not, one reiterates to steps 1 and 2 (freedom to contract and freedom to choose the contracting party).[580]

These elements of freedom are indeed described from a theoretical and ideal situation. In reality, it may happen that one party has somewhat more "freedom" (or conversely power to restrict the other party's freedom).[581] Yet, whether strongly or weakly present, these elements are in principle essential to each contract.

In their analysis on contracting in employment services, EICHENHOFER and WESTERVELD notice that the "contracts" used in employment services generally lack the elements of freedom typical to a contract. Hence, they come to the conclusion that it is difficult to speak of a contract in the strict sense of the concept[582]: "[c]an the justification for contractual liberty in general also be extended to the recipient of benefits? Is she or he really free to choose? And, on the other hand, what is the role of the public employment services (PES): is it legitimized to choose freely? Of course, the beneficiary is not bound to apply for benefits. In this respect, one can argue, the beneficiary is in the same position as a member of any market: he or she can abstain from entering into an agreement with someone else. This, no one is forced to enter into the PES-allowance-recipient relationship. One might argue, additionally, that freedom of contract is not

[578] A. YEATMAN, "Interpreting contemporary contractualism", in M. DEAN and B. HINDESS (eds.), *Governing Australia: Studies in contemporary rationalities of government*, Cambridge, Cambridge University Press, 1998, 165.
[579] H. KÖTZ and A. FLESSNER, *Europäische Vertragsrecht*, Tübingen, Mohr, 1996, 10.
[580] W. VAN GERVEN and S. COVEMAEKER, *Verbintenissenrecht*, Leuven, Acco, 2006, 111.
[581] See further on this below on the section of the unequal position.
[582] E. EICHENHOFER and M. WESTERVELD, "Contractualism: a legal perspective", in E. SOL and M WESTERVELD, *Contracutualism in employment services*, The Hague, Kluwer, 2005, (21), 30-31.

substantially endangered by the necessity of the service offered by a contractor. […] However, this argument cannot convince, because it gives no insight into the problematic of contractualism in employment services. Benefits are intended and paid to safeguard the recipient's and her or his family's fundamental subsistence. The mandatory public institutions have not only a commitment to, but also the monopoly on support. Hence in reality the beneficiary is not free, due to a lack of alternatives, to opt for the benefit or not. In order to survive, alone or with the family, the beneficiary has to opt for the benefit. This simple fact reduces the contractual power of the beneficiary substantially."

Furthermore, in their analysis on the side of the (public) administration, they also come to the conclusion that the contractual freedom is restricted, if not to say absent: "it can abstain from giving allowances. But the result would be social disorder and, expressed in legal terms, a violation of fundamental rights. […] And, because the benefits are payable from public funds, the administration has to respect and follow the legal rules binding all public authorities in general: the rule of law, the principle of equality and human rights. It is therefore clear that the provision of the benefit itself is beyond any contractual discretion of the administration and that the beneficiary's right in general does not stand under contractual limits. The bargaining power assumed by the contracting parties in the employment service is not directed at determining the beneficiary's rights; rather it is restricted to the actions to be undertaken by the beneficiary in the future." The latter shows that the freedom to stipulate the contents of the contract is also absent. The entitlement conditions are indeed provided by the statutory social security acts. The contract mainly has as purpose to translate these statutory conditions in concrete terms adapted to the (un)employment reality of the beneficiary. Possibly, the rules can be further refined in the contract, yet remain within the statutory framework of the more general entitlement conditions. By doing so, the beneficiary may become better responsibilized in his/her behavior.

This analysis is refined in a follow-up paper regarding the relation between the beneficiary and private providers of employment services[583]: "[t]he issue becomes more topical once employment services are privatized. Contrary to PES and the job seeker, private employment service providers and the job seeker are not in a pre-arranged relationship with each other. Moreover, both are free to choose whether or not to enter into the relationship: the provider can refuse this client; the job seeker can request another provider. Under these circumstances, the arguments why the arrangement is non-contractual are less valid: the document can achieve a legal contract status." Yet the question remains whether beneficiary and providers are negotiating on the core contents of the benefit (the general entitlement conditions). The contract is about the access to a concrete service, not so much about the entitlement to a benefit. Similarly, in a health care system, the beneficiary, once he fulfills the entitlement conditions, is granted access to the health care facilities. Many countries organized their health care

[583] E. SOL and M. WESTERVELD, "The individual job seeker in the sphere of contractualism", *International journal of sociology and social policy*, 2007, (301), 306.

system in a way that the beneficiaries can choose the health care provider they prefer. The contract is materializing the access to the concrete health care provider, not the social security entitlement (granting access to health care). Or as BONVIN stated it: "[a]s a matter of fact, the truly contractual relationship is not between the beneficiary and the provider, but between the state, responsible for funding […] and the private provider."[584]

In similar lines, SOL and WESTERVELD observe that "[i]n most countries where private service providers entered the scene, this fact appears to have been an important driving force behind client-oriented instruments such as vouchers, individual employment service agreements (IROs) and personal budgets. […] Vouchers and personal budgets do not so much create a contract relationship with the job seeker, as they create a relationship between the service provider chosen by the job seeker and the public financier. Just as with a regular employment service provision contract, the job seeker is not a contracting party or principal; at most he can claim the title "quasi-principal" because of his involvement in the choice of the provider. Naturally, after making the individual-oriented service provision contract, a job seeker contract can also be made between the job seeker and the service provider selected by the job seeker, but this in principle separate from the financing-oriented service provision contract".[585]

6.3.2 Unequal position between the parties

As it was mentioned before, the freedom to stipulate the contract (the bargaining freedom) is seriously hampered in social security arrangements. Social security authorities are traditionally in a stronger position than the beneficiary, as the latter is in a needy position. Furthermore, the "bargaining freedom" of the potential beneficiary to determine the obligations and more overall the conditions, is rather limited. Yet, this is not sufficient to say that the understanding which the parties may have reached could not be labeled as a contract. Indeed, in modern life we are daily confronted with such an inequality; one has e.g. only to think of the transport contract one concludes when entering a train or bus.

But also in relation to the "free will" of the other party (the administration), one can raise some serious doubts. Indeed, what freedom do most administrations have in relation to the definition of their own obligations and the acceptance of the duties of the counterparty? Are they not completely bound to their legal tasks and competencies, as well as to the legal rights and duties of their "clients"?[586] Are these rights and duties not already stipulated by statutory acts? Looking at it from this angle, the administration can be considered as "weak party" as well: the framework within which the administration

[584] J.-M. BONVIN, "Activation policies, New Modes of Governance and the Issue of Responsibility", *Social Policy and Society* 2008, (367), 373.
[585] E. SOL and M. WESTERVELD, "The individual job seeker in the sphere of contractualism", *International journal of sociology and social policy* 2007, (301), 306.
[586] Ibidem.

can take action concerns the sanctioning of the non-compliance of the conditions by the counterpart (the beneficiary).

6.3.3 Legal nature of the sanction in case of no fulfillment of the contractual conditions

When the beneficiary does not comply with the "contract", the sanction that will be imposed by the administration is already provided for by the statutory act (see also below).

In civil law, in case a contract is not being honored by one of the parties, it is normally upon the judge to apply the most appropriate "sanction", and this in line with what seems to be most fit taking into consideration the main purpose of the contract. It is not upon one of the parties to unilaterally impose sanctions when the other contracting party does not obey by the contract.

Even when contracts are applied to fine-tune the rights and obligations of the concerned parties, sanctions are still clearly stipulated by the (statutory) acts in social security. Depending upon the infringement, they can range from a warning over a reduction or full suspension of benefit payment and even to penal sanctions. When the beneficiary does not fulfill the contract, he will in fact not comply with the law. Consequently, the administrative authorities will have to apply the sanction as foreseen by the statutory acts since, in the end, this situation continues to apply the logics of public law.

This brings us to the object/cause issue: what is the contract about? A closer look teaches us that it is not about the mutual rights and duties of the social security administration and the beneficiary. It is rather an understanding about what these rights and duties mean in the concrete situation, an understanding between the two directly involved parties that however cannot alter the legal contents of the respective rights and duties. In other words, it is about the way the administration will exercise its discretion and the way the social security client will have his/her freedom limited in order to conform to the legal duties imposed upon him/her. As a consequence, not responding to the rights and duties contained in the so-called contract will not lead to a breach of contract in the legal sense of the word, but rather to a questionable exercise of powers on the side of the administration or a suspect behavior in responding to his/her legal duties on the side of the beneficiary of social assistance or unemployment benefit.

The question is not without practical consequences. Indeed, we believe that in case of a "breach of the mutual contractual responsibilities", the relevant question will be: did the concerned administration, or the concerned person for that matter, behave in a way that can be reconciled with their legal duties? The terms of the agreement between the administration and the client can help in answering this question, but are not decisive as such since nor the administration, nor the client dispose of the freedom to alter their mutual obligations. This is not the realm of free choice.

In social security these obligations are established by law. In this respect, EICHENHOFER and WESTERVELD come to similar conclusions in their analysis on contractualism in employment services: "[T]he contractual agreement is not the legal basis upon which the PES and benefit recipients create their mutual cooperation. In fact, its role is much more modest and meager. The contractual elements in a job seeker's contract are no more than a technical vehicle in the formation of a relationship based on subordination. Their justification lies not in the document itself but within a statute that establishes the legal status between the so-called contractors. It is this rule of law which gives them a potential for negotiations under certain specific, strictly defined circumstances."[587] And somewhat further in their concluding remarks: "Job seekers contracts are, in short, embedded in a public law framework, which in its turn must be expanded and adjusted to the peculiar circumstances of client contractualism. No discrimination may be permitted, and no actions can be imposed on the beneficiary which might risk undermining human rights.[… T]he risk of unlawful behavior of the PES must be kept in check by the rulings of the public law framework."[588]

In a certain way, one could say that contractualism somewhat reshaped the discretionary powers which in some occasions are granted to (local) authorities to shape the entitlement conditions. It can be done in a very broad or in a rather restricted manner, and hence it will respectively give a larger playing field for "bargaining" action for the beneficiary. Yet, the bargaining freedom remains restricted to the public law framework that surrounds it. Here as well, it will be checked whether the equality principle has not been violated and that there is no random deviation from the general code of conduct (i.e. the pseudo-legislation).

Contracting entitlement conditions can thus not be done at random: "The job seeker's allowance is in other words, one element within a broader and legally defined relationship between the PES and/or private service provider and the beneficiary. This relationship must respect all principles accepted for the interaction between the PES and the beneficiary: fairness, effectiveness, equality and other human rights […]. For this reason, […], a set of rules on procedural fairness must be elaborated in order to make client contractualism feasible under fair and balanced circumstances."[589] In this perspective, the principle of equal treatment is a good example. At first glance, job seeker's allowances seem to ignore or even contradict this principle, as the assistance through these contracts is individualized and thus by definition different for each beneficiary. Yet, one can only compare the comparable: the contractual application of the general entitlement conditions should remain equal for all concerned. The contract can be a tool for making the conditions tailor fit, but the general condition should remain

[587] E. EICHENHOFER and M. WESTERVELD, "Contractualism: a legal perspective", in E. SOL and M WESTERVELD, *Contractualism in employment services*, The Hague, Kluwer, 2005, (21), 35.
[588] Idem, 36.
[589] E. EICHENHOFER and M. WESTERVELD, "Contractualism: a legal perspective", in E. SOL and M WESTERVELD, *Contractualism in employment services*, The Hague, Kluwer, 2005, (21), 36.

the same though for all concerned. Detailing the conditions through individual contracts should not nullify the general condition at the end of the day.

6.3.4 In conclusion: contractualization but no contract

Taking into account the previous chapters, we come to the conclusion that the contracts present in social security arrangements are not to be considered as genuine civil law contracts, not even as contracts sui generis.

They are a tool to make the conditions more tailor fit to the social situation of the beneficiary: they help to better responsibilize the beneficiary. But in the end of the day, they remain within the statutory framework of the scheme at stake. In other words, the conditions do not find their (legal) source in the contract, but in the statutory acts that granted the necessary powers to the administrations to further develop the entitlement conditions. This is best shown by the sanctioning: in the end, the legal source that empowers potential sanctioning is to be found in the statute and not in the contract.

Also PIETERS came to a similar outcome in his paper on the relevance of "free choice" in social security when analyzing the presence of a growing "contractualism" in employment and social assistance schemes[590]: "[i]n civil law countries we tend to agree that a contract requires the coinciding free will of two persons and an object/cause for the contract, i.e. a substance about which an agreement is reached. Yet two elements seem questionable: the free will of both parties and the object/cause of the contract […]."

This brings us to the object/cause issue: what is the contract about? If we look closer to it, it is not about the mutual rights and duties of the social security administration and the beneficiary of the unemployment or social assistance benefit. It is rather an understanding about what these rights and duties mean in the concrete situation: an understanding between the two directly involved parties that however cannot alter the legal contents of the respective rights and duties. In other words, it is about the way the administration will exercise its discretion and the way the social security client will have his/her freedom limited in order to conform to the legal duties imposed upon him/her. As a consequence, not responding to the rights and duties contained in the so-called contract will not lead to a breach of contract in the legal sense of the word, but rather to a questionable exercise of powers on the side of the administration or a suspect behavior in responding to his/her legal duties on the side of the beneficiary of social assistance or unemployment benefit.

Consequently, schemes that design the conditioning around contracts also need to be in line with the standard requirements in relation to entitlement conditions, which are to be found in international and European social security law. It is specifically this question –

[590] D. PIETERS, "Freedom of choice in Europe's social security law", *European Journal of Social Security* 2003, 5, 287-304.

how far can we go with conditioning the behavior/action of the concerned beneficiary – which we will address in the next chapter.

6.4 Conditioning the element of conditionality

How far can we go in conditioning the behavior of the beneficiary? The final idea is that the protected person should be directed towards action that stimulates integration into society and labour market. Making use of the tool of contracts can help this process, but is not a necessary prerequisite.

The final question remains though how far a system can go with conditioning the "right" behavior/action. What are the limits in imposing conditions as to preferred behavior/action?

From a social policy point of view, one could say "as far as the social responsibility" takes. Social citizenship incorporates social obligations; rights have to be balanced by the duties of citizenship.[591] In a US-setting we could e.g. refer to GILBERT's vision on responsible citizenship: by referring to Mead's social citizenship[592], Gilbert outlines the possible reach of these obligations: "able-bodied adults are expected to work in available jobs, to contribute to the support of their families, to acquire fluency in English, to learn enough in school to be employable and to respect the law as well as the rights of others". Although plausible, this kind of yardstick is too general to serve as concrete reference. It does not enable us to answer e.g. concrete questions that emanate from the RightServicing proposal, such as: to what extent could we make people who are ICT literate, also use ICT in their contacts with social security? Self-management may require the fulfillment of other duties or more action by some socially protected persons: but how far can this be imposed upon them?

To address the question concretely, we will work with a legal yardstick, and more precisely with the existing legal international standards in the matter. The question then is: to what extent does international and European law limit the possibility to subject the attribution of social security benefits to a preferred action/behavior?

We will analyze the relevant international and European social law, i.e. conventions of the United Nations, ILO and Council of Europe, that are relevant to social security, and more in particular the entitlement conditions. The legal interpretations given to fundamental social rights, such as "right to work", "right to freely choose work", "right to social assistance", but also rules developing more in detail the minimum standards in relation to the work incapacity and unemployment, should help us to shed some light on

[591] N. GILBERT, US Welfare Reform: Rewriting the Social Contract, *Cambridge Social Policy Journal* 2009, (383), 387.
[592] L. MEAD, *Beyond entitlement: The Social Obligations of Citizenship*, New York, Free Press, 1986.

the question on what is acceptable and what is not for conditioning action/behavior of socially protected persons.

The analysis will relate to the conventions of the UN, ILO and the Council of Europe, as well as the interpretations given to these conventions by their competent (interpretation) committees and/or by the European Court of Human Rights for the application of the European Convention on Human Rights. Within each group, we will make a further distinction between social rights and (minimum) standards. Whereas the first are more defined in a principle manner, the latter develop the contents of the international and European provisions in a more detailed way. For the social rights, we will have a closer look at the International Covenant on Economic, Social and Cultural Rights (UN) and the European (Revised) Social Charter (Council of Europe); for the minimum standard provisions we focus upon the ILO Convention 102 and European Code of Social Security (Council of Europe).

Using these conventions as a reference tool is not without risk. Not all countries are member of (all of) these conventions, leave alone they have ratified these conventions. Moreover, the legal value (the degree of enforceability) of the concerned instruments is questionable. Except for the Convention on Human Rights, these conventions miss out direct applicability in the sense that citizens cannot rely directly upon them in case their (social) rights would be infringed upon. In other words: they lack hard sanctions that can be taken in case of non-compliance. The conventions are considered to be of a programmatic nature.[593]

On the other hand, the concerned conventions do have a specific reporting procedure in place and the application by the member states of the said conventions is subject to a regular (annual or bi-annual) control that can possibly lead to a call for compliance by the competent governing committee.

The fact that the concerned conventions have been developed by international and European organizations, such as the UN, ILO and Council of Europe, and that a large number of countries have accepted these conventions, gives the provisions a high moral value. In a way, the conventions can be considered as a concrete reference model to which a large number of European states gave their consent. Consequently, they can be used as a testing framework for the subject of our interest, i.e. conditioning social security entitlements.

In what follows, we will first discuss the social rights conventions (instrument of principle declaring social rights) followed by the minimum standard conventions (giving the principle a somewhat more concrete corpus through minimum standards) and will end finally with the human rights that are applied in social security matters (conditioning in

[593] Article 2 (1) of the International Covenant on economic, social and cultural rights leaves not much doubt about this: “to take steps…with a view to achieving progressively the full realization of the [Covenant] rights…by all appropriate means”.

particular). After a short introduction on the concerned conventions, we will highlight the provisions that are relevant for conditioning social security.

6.4.1 Social rights conventions

Two conventions are of interest here: the International covenant of economic, social and cultural rights (UN) and the (Revised) European Social Charter (Council of Europe).

The Covenant was adopted by the General Assembly of the United Nations in 1966. Its main purpose is to materialize the social provisions of the Universal Declaration of Human Rights. The Universal Declaration of Human Rights of 10 December 1948 sums up a number of social rights which are granted to “everyone”. The corresponding articles 9 to 12 of the International Covenant on economic, social and cultural rights of 19 December 1966 were drafted in a similar way. The implementation of the Treaty is observed by a specific committee (Committee on Economic, Social and Cultural Rights), which consists of independent experts. Comments issued by the Convention are legally non-binding on Contracting States, in the sense that they are not enforceable.

Article 9 of the Covenant obliges States Parties to recognize “the right of everyone to social security, including social insurance”. In addition, articles 11 and 12 lay down “the right of everyone to adequate food, clothing and housing” and “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

The Council of Europe’s (CoE) European Social Charter (ESC) and its Revised version guarantee economic and social human rights. The Charter originally dates from 1961, but was revised in 1996. The original and the revised document are two distinct treaties, but they strongly resemble each other in the field of social security. Compliance with the provisions of the Charter is supervised by the European Committee of Social Rights, a committee of independent experts. Conclusions of the Committee are not legally binding and neither are the recommendations of the Committee of Ministers of Social Rights. In Part I, the European Social Charter and the revised document set out rights to be guaranteed. They include, amongst other rights:

- The right of all workers and dependents to social security (article 12);
- The right of anyone without adequate resources to social and medical assistance” (article 13).

Part 2 of the Charter translates these rights into precise obligations for the Contracting States. The most relevant to this research are quoted below:

Article 12 – The right to social security

With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1. to establish or maintain a system of social security;
2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
3. to endeavour to raise progressively the system of social security to a higher level;
4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
    a) equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
    b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

Article 13 – The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

Strictly speaking, no reference is made to the further conditioning of social security. Yet, in some interpretations given by the competent committees we find some relevant guidelines as how far systems can go with conditioning the entitlement conditions.

The basic principle is that “the right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether

obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies".[594] Within the framework of the European Social Charter, we can read that: "Restrictions to the right to social security should fulfill the following conditions:

- They should be prescribed by law: which means that they are enacted by statutory law or any other text or case-law provided that the text is sufficiently clear (i.e. that satisfy the requirements of precision and foreseeability implied by the concept of prescribed by law
- They pursue a legitimate purpose, i.e. the protection of the rights and freedoms of others, of public interest, national security, public health or morals; and
- They should be necessary in a democratic society for the pursuance of these purposes, i.e. the restriction has to be proportionate to the legitimate aim pursues (there must be a reasonable relationship of proportionality between the restriction on the right and the legitimate aim pursued."[595]

6.4.1.1 Conditions should be reasonable

In the conclusions of the social charter committee we can read, with regard the labour market conditions, that: "a precondition for assistance benefits is that those concerned must actively seek work and accept any reasonable job offer. If all attempts fail, social services will assist in finding work or providing training facilities. If claimants refuse to co-operate, the social services may impose penalties. It is in conformity with Article 13 to establish a link between social assistance and willingness to seek work or undertake vocational training, so long as the conditions are reasonable and fully consistent with the objective of providing a long-lasting solution to the individual's problems (Conclusions XIV-1). The establishment of a link between social assistance and a willingness to seek employment or to receive vocational training is in keeping with the Charter, in so far as such conditions are reasonable and consistent with the aim pursues, that is to say to find a lasting solution to the individual's difficulties."[596]

6.4.1.2 Conditions should not deprive the individual of means of subsistence

However, reducing or suspending social assistance benefits is only compatible with the Charter if this does not deprive the individual concerned of means of subsistence. The Committee therefore asks for details in the next report on how the arrangements work in practice, what conditions offers of employment must meet and what reasons for refusing an offer are acceptable.

[594] General comment Committee on Economic, Social and Cultural Rights, n° 19, E/C.12/GC/19, n°4.
[595] Digest of the case law of the European committee of social rights, 1 September 2008, 117.
[596] Conclusions Committee social rights XIII-4, statement of interpretation on article 13§1, pp. 54-57.

It also asks what form the penalties take and whether there is a right of appeal to an independent body against such decisions (Conclusions XIV-1). In similar lines: "[t]he establishment of a link between social assistance and a willingness to seek employment or to receive vocational training is in keeping with the Charter, in so far as such conditions are reasonable and consistent with the aim pursued, that is to say to find a lasting solution to the individual's difficulties. Reducing or suspending social assistance benefits can only be in conformity with the Charter if it does not deprive the person concerned of his/her means of subsistence."[597]

Furthermore, it must be possible to appeal against a decision to suspend or reduce assistance (Conclusions XIV-1). Social assistance must be provided for as long as the situation of needs persists. Subject to participating in training or accepting employment, the right to social assistance must be conditional only on the criterion of necessity, and the availability of adequate resources must be the sole criterion according to which assistance may be denied, suspended or reduced.[598]

The Committee on social rights considers "that in a situation close to full employment and of economic growth the adoption of measures which are so restrictive is not proportionate to the objectives pursued and does not come within the range of adaptations of the social security systems permissible under article 12 (right to social security) Social Charter."[599]

In the framework of the Covenant it has been mentioned in relation to South-Korea that "conditions of eligibility" should not be of a kind as to exclude many of the poor.[600]

6.4.1.3 Conditions should respect the dignity of the person

When countries modify their systems, the Committee has made it clear that suchlike modification should not reduce the effective social protection of all members of society against social and economic risks and transform the social security system into a basic social assistance system.[601] Reforms of social security which do not respect the dignity of those in receipt of benefits may fail to conform to article 12(3). The benefit system in Denmark following reform was considered by the Committee to be very stringent and virtually compelling unemployed persons on pain of loss of benefits to accept a job regardless of the occupational field from the first day of unemployment. The Committee held that "one of the aims of an unemployment benefit systems is to offer unemployed persons adequate protection during at least an initial period of unemployment from the obligation to take up any job irrespective of occupational field, precisely with a view to

[597] Conclusions Committee social rights XIV-1, statement of interpretation on article 13§1, pp. 52-55.
[598] Conclusions Committee social rights XVIII-1, Spain, p. 745.
[599] Conclusions Committee social rights XV, p. 441.
[600] Committee on Economic, Social and Cultural Rights, Conclusions on Republic of Korea (n. 192).
[601] Council of Europe, *Digest of the case law*, Strasbourg, p. 62.

giving them the opportunity of finding a job which is suitable taking into account their individual preferences, skills and qualifications […]. Unemployed persons should be treated with due respect for their professional, social and family status and not as ordinary labourers, physically and mentally fit for any job" (Conclusions XVII-1, Denmark).

This is somewhat in line with the conclusions of the Human Rights Committee that act within the "twin" Covenant on Civil and Political Rights in relation to the right of work and more particularly the prohibition against forced labour (article 8). In the case *Faure*[602], the Committee addressed the issue of whether the requirement of performing labour in exchange for unemployment benefits, was contrary to article 8. In the absence of a degrading or dehumanizing aspect of the specific labour performed, the Committee held that the labour in question did not fall under the scope of the proscriptions set out in article 8 of the covenant regarding compulsory labour.

In relation to the right to work, as being stipulated in the Covenant under article 6 on the right to life, we are remembered that this fundamental social right corresponds to the requirement of human dignity. Hence, such a guarantee would have to ensure that in an ideal situation the type of work suited the skills and aptitudes of the individual worker concerned, and that the individual be given the right to refuse employment. More concrete is its reference to the fact that the "employment should be productive and that measures should be adopted to this end. It would appear to consider that policies merely aimed at producing high levels of employment with no apparent benefit to society are incompatible with the Convention."[603]

6.4.1.4 Conditioning should not be discriminatory

The Committee (of the Covenant) is specifically concerned with distinctions, exclusions, restrictions, or preferences, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, colour, sex, religion, political opinion, nationality, or social origin, which have the effect of nullifying or impairing the recognition, enjoyment, or exercise of equality of opportunity or treatment in employment or occupation.[604]

For an extensive dissertation on the subject of discrimination, we refer to chapter 5.

[602] *Bernadette Faure v. Australia* (Communication No. 136/2001), Views of 31 October 2005. In contrast to the social covenant, this Committee can work on the basis of an individual complaints procedure.
[603] M. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights*, Oxford, Clarendon Press, 207.
[604] Ibidem.

6.4.1.5 The conditions under which the benefit is awarded should not be discretionary

With regard to article 13 of the Social Charter, the Committee stated that "Article 13(1) grants a legal right to assistance, that the awarding of such assistance must not be discretionary, and that there must be a right of appeal to an independent body if applications for assistance are refused."[605] And further on, with regard to labour market conditions: "[w]here Contracting Parties link social assistance to an individual willingness to seek employment or to undergo vocational training, this is conformity with the Charter provided that such conditions are reasonable. For example, any reduction or suspension of benefits will only be in conformity with Article 12 if the individual in need is not deprived of their resources of subsistence. Furthermore, the conditions imposed upon the receipt of benefits must contribute to finding a lasting solution to the individual's needs."[606]

Also in relation to social security, the Committee for the application of the Covenant states that there must be a system to materialize the right to social security, whether composed of a single or variety of schemes to ensure that benefits can be accessed for the relevant categories of social security and which should be established under national law and where public authorities must take responsibility for the effective administration or supervision of the system.[607]

The fact that the schemes may not be discretionary in the eventual award of benefits has some consequences for the schemes under investigation. In what preceded, we could see that in some schemes administrations enjoy (a large amount of) discretionary powers to manage social security schemes. This is especially the case in social assistance and social welfare schemes, as well as in some of the CCT-systems. At the same time, contractual arrangements with beneficiaries, outlining the entitlement rights and duties of both parties - i.e. administration and beneficiary - find their way in these schemes. The shaping of the entitlement conditions seems to have become subject of contractual bargaining rather than the outcome of (statutory) regulations. However, the contractual tool itself is nothing more than an alternative way in explaining the regulatory framework more clearly towards the beneficiary by outlining his rights but also the obligations that go along with the entitlement and to tailor the service more in line with the specific needs of the beneficiary. Consequently, the administration seems to have a bit more freedom in tailoring the benefit or service since it cannot be standardized from the outset in statutory acts.

Yet it remains the question how far the administration's freedom reaches in conditioning the entitlement to social security. As we mentioned before, the discretionary power is not to be understood as the possibility to do whatever seems appropriate in the view of the

[605] Conclusions XIII-4, Greece and conclusions XVII-1, Greece.
[606] Council of Europe, *Digest of the case law*, Strasbourg, p. 64.
[607] Draft General Comment No. 20., paragraph 11(a)(ii).

administrative bodies. Discretionary power cannot be put on par with the absence of control over the use of their competence.

In this respect, the notion of pseudo-legislation has been developed in a number of countries: when administrative bodies operate along a certain line of conduct in the use of their discretionary competence, they can only deviate from that particular line of conduct if they have good reasons to do so. It will be checked whether the equality principle has not been violated and that there is no random deviation from the general code of conduct (i.e. the pseudo-legislation). Conditioning can thus not be done at random but has to respect to basic principles of good administrative conduct. Here we can think of principles of equal treatment, the respect of personal integrity, and so forth.

Furthermore, the administrative body should also be granted the powers from the competent institution (parliament, government, …) to further regulate the conditioning. With this delegation of competence, the framework that one needs to respect will have to be described as well.

Because of its one-sided character, administrative law has brought a variety of legal safeguards to delineate and limit possible abuse of this public power. Normative principles such as proportionality, equality and the respect of human rights were elaborated and accepted as legal safeguards against a one-sided supremacy of public authorities. So, despite its asymmetric nature, the relationship between the administration and the beneficiary has been embedded in a legal framework intended to guarantee each beneficiary a fair and balanced treatment by the public authorities.

The tendency to the use so-called contractualism between administration and beneficiary does not change the need for such public policy. Similarly, no discrimination may be permitted, and no actions can be imposed on the beneficiary which might risk undermining the human rights. Moreover, the conditions should remain in line with statutory provisions stipulated on national and international level.

All of this eventually constitutes the public law framework that has to be respected by the administration, even when it received some freedom to condition the social security entitlements.

6.4.2 Standard setting instruments

The Social Security Minimum Standards Conventions (ILO N° 102 and the European Code) lay down minimum standards in the major branches of social security. These are medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivor’s benefits.

Thus, the standard setting instrument does not reach upon social assistance schemes. The standards of the Code have been inspired by what was written down in ILO

Convention 102. Practically speaking, the Code is almost a copy of the standards of the ILO Convention. Moreover, standards of both instruments are being monitored by one and the same committee of experts. The ambit of the Code however encloses the European states that are member to the Council of Europe. This translated itself into a more ambitious objective of accepting at least the standards of six contingencies, rather than the minimum of three as required under the ILO Convention 102.

The standards do not reach upon the general social assistance schemes targeting minimum subsistence. On the other hand, they may be relevant for categorical social assistance insofar they relate to one of the enumerated risks covered by the minimum standard conventions.

Contracting States have the possibility to accept at least three (respectively six for the application of the Code) branches of social security upon ratification, allowing for gradual implementation of the standards in other fields of social security. The standards relate, most notably, to the quantitative level of social protection in a country, the qualifying conditions, the level of the benefits and the periods of entitlement.

Over the years, the ILO has adopted a number of instruments further elaborating the social security standards enshrined in Convention No. 102. These instruments raise the standards of protection for selected branches of social security. Examples in this respect are the Employment Injury Benefits Convention (C121), the Invalidity, Old-Age and Survivor's Benefits Convention (C128), the Medical Care and Sickness Benefits Convention (C130), the Employment Promotion and Protection against Unemployment Convention (C168), and the Maternity Protection Convention (C183).

Within the framework of the Council of Europe, more elaborated standards have been incorporated into a Protocol to the Code, which some Contracting States to the (basic) Code have ratified. Furthermore, a Revised Code has been launched by the Council of Europe in 1990 with standards more adapted to the evolutions which the social security systems in Europe underwent. Yet, so far the Revised Code is not being applied as only two states (the Netherlands and Norway) ratified the instruments, whereas a minimum number of three states is required.

Both conventions do set standards with regard to entitlement conditions, yet they do not concretely outline how far conditioning with regard to social security entitlement can go. Within each chapter dealing with a contingency (medical care, old age, ….), we do find standards regarding traditional entitlement conditions. For instance, we read that the qualifying period to open entitlement cannot be longer than X amount of time or that the waiting period after one is entitled to a benefit cannot be longer that Y amount of time; that the duration to pay out a benefit should last at least a minimum period of so much time or that reduced (invalidity, old age, and survivorship) pensions should be guaranteed as well when the insured person built upon (only) a fraction of the full insurance record (normally the amount is in relation to the built up insurance fraction). In

other words, the convention sets standards regarding entitlement conditions but does not explicitly stipulate what kind of conditions one can formulate for the respective contingencies.

Some guidance is given in the framework of the unemployment contingency with regard to the availability for (the) labour (market). The contingency of unemployment is defined as a situation of suspension of earnings (so the person is assumed to have worked previously) due to the inability to obtain suitable employment in the case of a protected person who is capable of, and available for work (article 20 ILO Convention/Code). The definition thus refers to persons being "capable of, and available for work".

Although by this definition one sets entitlement conditions regarding availability and/or work capability, neither the Convention nor the Code provide any additional guidance on the exact meaning of these terms. The Convention and Code do refer though to the concept of "suitable work" as opposed to the concept of "any work". Availability for suitable work takes into consideration a number of factors such as the qualifications of the unemployed person, his experience, age and duration of employment in the person's previous job, as well as family and personal circumstances.[608] These last elements are important in considering jobs that may involve moving residence, travelling or working on the night shift. Although the Code and the Convention do not define "suitable employment", the committee has requested some states to cease applying concepts that are clearly too restrictive.

One means, by which the definition of suitable employment has been restricted, is through reversing the burden of proof. For example, instead of obliging someone to accept job offers of suitable employment, the contracting party removes benefits from those who refuse offers for work "without good cause". Consequently, the burden of proof was shifted to the claimant. Interesting is that the Committee, as answer to the defense of involved countries claiming that in practice the concept of suitable employment was honored, declared in a resolution that it was prepared to accept that the concept of suitable employment was respected in practice if the concerned country were to provide copies of the administrative guidelines given to those who decide if a refusal of work has been made with good cause. This shows that the committee is prepared to accept the administrative reality of the situation and will accept it when something is fulfilled in practice. It also indicates that a state does not have to pass legislation in order to fulfill its obligations; this can be just as easily done with administrative guidelines. Yet, the guidelines should not be stipulated at random and reflect the general ideas behind the statutory defined entitlement condition that they further develop in detail.

[608] See COUNCIL OF EUROPE, European Code of Social Security. Short Guide, Strasbourg, Council of Europe Publishing, 2003, referring to the conclusions of the committee of experts on the standards of both the ILO Convention 102 and the Code.

In the common provision of the Code and ILO Convention, article 68 is of relevance. This article describes the possible grounds that can be invoked to suspend benefits. The article clearly reflects the idea that the ground should be serious enough. Moreover, benefits should only be withdrawn from a recipient under carefully prescribed conditions. The Code and Convention provide clear and precise statement of when benefits can and cannot be suspended. It effectively leaves little or no discretion to the contracting parties as to how these rules should be implemented. In this case, there are strong arguments to indicate that these provisions are self-executing and could be relied upon directly before the national courts.[609]

The Code and Convention list the only permissible situations in which the benefits may be suspended and these are when:

- When the recipient is maintained at the public expense or by a social security institution, for example in a rehabilitation center for incapacitated employees or in prison;
- The recipient is absent from the territory of the country (subject to the condition that the country invests in making sufficient coordination arrangements);
- The recipient is in receipt of another benefit (other than family benefit) or is paid in respect of the contingency by a third party other than the social security system (such as a private insurer);
- The recipient has made a fraudulent claim;
- The contingency has been caused whilst the recipient was committing a criminal offence;
- The contingency was caused by a willful act of the recipient (deliberately inflicted in order to obtain a benefit);
- The recipient, where appropriate, refuses to undergo medical treatment or rehabilitation that would reduce or even dispel the contingency;
- The recipient does not make use of the employment services placed at their disposal, when being unemployed;
- The (unemployed) recipient lost his/her job due to a stoppage of work during an industrial dispute or as a result of voluntary unemployment;
- With regard to survivor's benefits, the widow(er) lives with another partner as his wife/husband.

As such, this is article is not directly saying which conditions can be used (or not) when developing the entitlement condition or when developing further conditions in case persons are already entitled to a benefit. Yet indirectly, it is directing the conditioning of beneficiaries' behavior as it clearly sets rules under which eventualities the payment of the benefit can be suspended. The latter does also relate to the sanctioning

[609] See COUNCIL OF EUROPE, European Code of Social Security. Short Guide, Strasbourg, Council of Europe Publishing, 2003, referring to the conclusions of the committee of experts on the standards of both the ILO Convention 102 and the Code.

consequence of conditions that have been formulated with regard to the behavior of the beneficiary in case he/she does not honor the condition.

The legal enforcement through means of a suspension of benefit should be fitting into the requirements as stipulated in article 68. Especially with regard to some of the systems described above this could create some problems. How to sanction the required school registration or school attendance in relation to a family benefit scheme, in case this condition is not being fulfilled? Apparently, suspending the benefit in such a situation is a sanction that is not acceptable along the terms of the minimum standard conventions.

6.5 Human rights conventions and conditioning: the principle of "legitimate expectations"[610]

Finally, we mention the importance of the European Treaty on Human Rights for the RightServicing's aspect of conditioning. For sake of completeness, we also refer to section 5.2.1.1.2 in the previous chapter on discrimination.

More in particular, this section will elaborate on the protection of property that is ensured by one of the Treaty's protocols, namely the First Protocol of the European Treaty on Human Rights[611].

Article 1 of the First Protocol of the European Treaty on Human Rights disposes that:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The text of this article refers to the notions "possessions" and "property". Although these notions are in general only related to movable and immovable goods (e.g. real estate, money, tools, furniture, etc.), they have a much broader meaning in the human rights' context of the Article 1 of the First Protocol. In fact, this article protects the whole of a private person's patrimony, including all aspects that might have a patrimonial value for

[610] J. VANDE LANOTTE and Y. HAECK (eds.), *Handboek EVRM, Deel 2 Artikelsgewijze Commentaar, Volume II*, Antwerp-Oxford, Intersentia, 2004, 318-331.
[611] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 signed in Paris on 20 March 1952, *European Treaty Series*, No. 009.

that person.[612] Consequently, this article will have its importance for the RightServicing concept and its aspect of conditioning social security benefits as we have discussed in this chapter (and more in particular regarding the sanctioning of the benefit).

Furthermore, the European Court of Human Rights interprets Article 1 of the First Protocol in such an extensive way, that the notions of property and possession are deemed to also include the right on future property, the right on factual property and, most important in the context of conditioning, the right on so-called "legitimate expectations".

The idea behind this principle on legitimate expectations is that, from the moment a private person has a so-called "asset", this asset will be protected by the Protocol's right to property:

"*The Court recalls that, according to the established case-law of the Convention organs, "possession" can be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right."*[613]

And:

"In this connection, the Court points out that the Convention institutions have consistently held that "possessions" within the meaning of Article 1 of Protocol No. 1 can be either "existing possessions" (…) or assets, including claims, in respect of which an applicant can argue that he has at least a "legitimate expectation" that they will be realized."[614]

Although this principle extends the material scope of the right on the protection of private property, claims based on this principle are subject to certain conditions, namely:

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[612] L. CONDORELLI, "Article 1 Premie Protocole Additionnel", in *La Convention européenne des droits de l'homme, Commentaire article par article*, L.E. PETTITI, E. DECAUX AND P.H. IMBERT (eds.), Paris, Economica, 1995, 975 and 979; J. DE MEYER, "Le droit de propriété dans la jurisprudence de la Cour européenne des droits de l'homme", in *Le droit de propriété en Europe occidentale et orientale*, S. MARCUS-HELMONS (ed.), Brussel, Bruylant, 1994, 56; D.J. HARRIS, M. O'BOYLE and C. WARBRICK, *Law of the European Convention*, London, Butterworths, 1995, 517; P. VAN DIJK and G.J.H. VAN HOOF, *Theory and Practice of the European Convention on Human Rights*, Den Haag, Kluwer Law International, 1998, 320.

[613] ECtHR, *Presos Compania Naviera S.A. v. Belgium*, judgment of 1995, *Publ. Hof*, Series A, Vol. 332, §§31-32; ECtHR, *Greek Refineries Stran and Stratis Andreadis v. Greece*, judgment of 9 December 1994, *Publ. Hof*, Series A, Vol. 301-B, §59; ECtHR, *The National & Provincial Building Society and Others v. UK*, judgment of 23 October 1997, *Recueil/Reports*, 1997, §69; ECtHR, *Prince Hans-Adam II of Liechtenstein v. Germany*, judgment of 12 July 2001, *Recueil/Reports*, 2001, §83; ECtHR, *Polacek and Polackova v. the Czech Republic*, decision of 10 July 2002, *Recueil/Reports*, 2002, §62; ECtHR, *Jansiuniene v. Lithuania*, judgment of 6 March 2003, *Recueil/Reports*, 2003, §40.

[614] ECtHR, *Polacek and Polackova v. Czech Republic*, decision of 10 July 2012, http://hudoc.echr.coe.int/, §62.

- The Court reiterates that a “claim” can constitute a “possession” within the meaning of Article 1 of Protocol n° 1 if it is sufficiently established to be enforceable;[615]
- A legitimate expectation must be of a nature more concrete than a mere hope and must be based on a legal provision or a legal act such as a judicial decision;[616]

As to this second condition, it should be noted that, in principle, only in case a final judicial judgment has been made on a claim, the right on the protection of property can be invoked.[617] Nevertheless, the Court has repeatedly stated that a final judicial judgment is not always required in order to invoke the protection of Article 1 of the First Protocol.

Regarding this aspect, it is interesting to mention one of the Courts judgments in social security matters. In the framework of Greek functionaries' pensions, the Court judged that the conditions to be able to speak of legitimate expectations, are fulfilled when a pension claim was sufficiently certain.[618]

Moreover, the Court even ruled that an asset that has been recognized by national law can constitute a modality of property in the sense of Article 1 of the First Protocol, even though it might still be revocable.[619]

Consequently, by first granting a person the right to certain social security indemnities, and then later recalling this attribution, a state might violate the principle on legitimate expectations. It will thus be of the utmost importance that the conditioning aspect of the RightServicing system does not violate the Court’s principle on legitimate expectations.

An important nuance that should be made is the relation between the conditionality of certain property claims and the principle of legitimate expectations. More specifically, the Court has stated that when the legal claim on assets is subject to certain conditions, the asset will only be protected by the principle of legitimate expectations in case these conditions are fulfilled and have not already lapsed:

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[615] ECtHR, *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 84, § 59; ECtHR, *Burdov v. Russia*, judgment of 7 May 2002, *Recueil/Reports*, 2002, §40.
[616] ECtHR, *Polacek and Polackova v. Czech Republic*, decision of 10 July 2012, http://hudoc.echr.coe.int/, §66.
[617] ECtHR, *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 84, § 60.
[618] ECtHR, *Antonakopoulos, Vortsela and Antonakopoula v. Greece*, judgment of 14 December 1999, *Recueil/Reports*, 1999, §31; ECtHR, *Dimitrios Georgiadis v. Greece*, judgment of 28 March 2000, *Recueil/Reports*, 2000, §32; ECtHR, *Vasilopoulou v. Greece*, judgment of 21 March 2002, *Recueil/Reports*, 2002, §22.
[619] ECtHR, *Beyeler v. Italy*, judgment of 5 January 2000, *Recueil/Reports*, 2000, §105.

"(…) *nor can a conditional claim which has lapsed as a result of the failure to fulfill the condition [be regarded as a "possession"*]"[620]

[620] ECtHR, *Polacek and Polackova v. Czech Republic*, decision of 10 July 2012, http://hudoc.echr.coe.int/, §62.

7 Conclusions and executive Summary

When exploring legal aspects of RightServicing and especially of segmenting, we have done so on the basis of the international legal framework, including UN, ILO, EU and Council of Europe instruments and related case law of ECHR and ECJ; we have disregarded national law, as this domestic law can be adapted. From the outset we have observed that the RightServicing approach often presupposes clarity about the goals of social schemes and therefore seems to fit better means tested schemes and less continental social insurances schemes. Our investigation has focused on three main areas:

- data and privacy protection law;
- equal treatment and non-discrimination;
- conditionality of social security rights.

We have also been exploring related legal issues, situated outside social security such as segmented policing.

The key questions we addressed as far as data and privacy protection law were concerned are:

- In what way privacy driven data protection is a real hindrance to segmenting and the implementation of other RightServicing characteristics?
- What are the privacy and data protection constraints within which the social security administrations have to operate?

Operationalising these questions, we asked ourselves what filing and processing of personal data is allowed and under what conditions. In order to tackle this question, three elements will play a role:

- What is actually being done? (the filing, the processing) of which data?
- Why is it done? (the finality of the action)
- By whom is it being done? (the actors)

The lawfulness or not of an action will as a rule be depending upon the interplay of these elements. We also examined the importance of personal consent. The most relevant legal instruments of the European Union in this respect showed to be:

- The Data Protection Directive (95/46/EC) of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
- The Directive on privacy and electronic communications (2002/58/EC) of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector;
- The Proposal: General Data Protection Regulation to replace the DataProtection Directive 95/46/EC).

For the Council of Europe, most important documents are:

- Convention for the protection of individuals with regard to automatic processing of personal data, Strasbourg 28/01/1981;
- Non-binding Recommendations:
    - Recommendation N° R (86) 1 on the protection of personal data for social security purposes;
    - Recommendation CM/Rec (2010) 13 on the protection of individuals with regard to automatic processing of personal data in the context of profiling.

Our investigation of these instruments showed that the right to data protection is to be distinguished from the right to privacy, but that both rights are intertwined. The right to privacy (as in art. 8 ECHR) includes the right to protection of "'privacy sensitive" personal data (not of all personal data). By virtue of the theory of "the expectation of privacy", also public information on a person can be protected when the information is systematically collected and stored by authorities. The right to data protection protects all personal data. It considers all fundamental freedoms, not only privacy (also freedom of expression, of association, non-discrimination). The right to data protection regulates the collection and processing of data, the rights of data subjects, duties of data processors and providers. It includes special protection for special categories of data, viz. "sensitive data". Processing of personal data is allowed when meeting set legal conditions; however, processing of "sensitive" data is forbidden unless exceptions are set forth.

When turning to the principle of equal treatment and no discrimination, we found that equal treatment means treating equal situations equally and different situations differently. Discrimination is prohibited, both direct discrimination (most relevant for RightServicing) and indirect discrimination. Prohibited differentiation grounds mostly include: race, sex, nationality, disability, age, sexual orientation, health status etc. However, not every differential treatment explicitly based on nationality, race, gender, etc. constitutes a direct discrimination. This is not the case when the differential treatment can be reasonably and objectively justified; or when EU or international law provides for derogations to the principle of equal treatment. It is also not the case when the differential treatment can be qualified as a positive action measure. When qualifying RightServicing initiatives as "positive action", we have more chance to successfully justify segmentation.

As to the conditionality of benefits, the key question is what actions can be imposed upon a person qualifying for a benefit (fulfilling the legally set conditions) in order to actually benefit from the scheme. To what extent does law limit the possibility to subject the beneficiary of social programs to the duty to take up such actions in order to actually benefit from the programs? Conditions may relate to behavior. We know traditional labour market conditions such as making oneself available to labour market, looking for work, accepting offered work, training and vocational training. But these conditions may also relate to undergoing medical treatment, enrolling children into school etc. Such conditions are mostly present in "alternative" forms of social security (such as CCTs). CCTs are indeed designed as social programmes that transfer cash based on the premise that households will use health, education or other services that policymakers consider of public interest.

Conditionality has its place in social protection mainly in areas complementary to "traditional" social security arrangements: where traditional social security fails to reach out (in informal societies) or in multidimensional perspective of poverty/social risks. The question remains whether it is acceptable for social security as such. Conditionality is mostly found in social assistance and social welfare schemes (tailor made, personal budgets,…) and as far as social insurances are concerned in unemployment schemes, and increasingly also in work incapacity schemes, health care and child care schemes. We did not confirm the "contractualization" approach which is sometimes put forward, as the contractual agreement cannot be the legal basis upon which the administration and the benefit recipient create their mutual cooperation. It is not more than a technical vehicle in the formation of a relationship based on subordination. We also stressed that there are limits in imposing behavioral conditions in social security. These are to be found in International and European law relating to social rights, minimum standards of social protection and human and fundamental rights affecting social security.

Establishing a link between social assistance and labour market conditions seems acceptable in so far the conditions are reasonable and fully consistent with the objective of providing a long-lasting solution; and that they are not so rigid as to exclude many of the poor. They must not deprive the individual concerned of means of subsistence (when in case of non-compliance the benefit is reduced or suspended). Beneficiaries should be treated with due respect to their professional, social and family status. Conditionality should correspond to the requirements of human dignity.

The awarding of assistance must not be discretionary. As far as human rights are concerned, special consideration is to be given to the equal treatment principle, the respect for human dignity and integrity, and the protection of property.

Concluding, RightServicing consists of a number of elements, many of them depending upon segmenting. Segmenting can be done along various criteria. Various norm setting bodies (EU, CoE, UN, etc.) and various legal principles are involved (privacy and data protection, non-discrimination etc.). We examined the European and international legal framework in which the various RightServicing elements and especially segmenting need to be developed. Answers as to feasibility of concrete RightServicing initiatives need to be nuanced. Every single concrete initiative has to be looked at as to its own merits and problems. An initiative is hardly ever absolutely legally safe, nor absolutely legally impossible. A few general thumb rules nevertheless follow:

- When taking a RightServicing initiative, one is to be ready to adapt the national legislative framework. A RightServicing initiative without legal basis may be difficult, also in the light of EU and international law.
- The RightServicing initiative will always have to comply with fundamental rights and freedoms; but, one should consider the matter closely, as also fundamental rights and freedoms may need interpretation and even restriction.

- Data protection rules are more strict when “sensitive data” are concerned. In fact, whereas processing of personal data is allowed when meeting set legal conditions, processing of “‘sensitive” data is forbidden unless exceptions are set forth.
- Discrimination is strongly prohibited, but not every differential treatment constitutes discrimination. There is no discrimination when:
    i. there is an objective and reasonable ground for distinction
    Justification of a distinction needed by RightServicing will be most difficult when the RightServicing initiative implies direct discrimination (rather than indirect) or distinctions based on race, gender etc.
    or
    ii. the differential treatment is seen as positive action
    Justification of a distinction needed by RightServicing will be easier when the RightServicing initiative can be seen as a positive action.
- Making social benefits conditional (through CCT or “contractualization”) is possible and often applied (when considering also entitlement conditions e.g. in unemployment benefit schemes). Yet, the conditionality is itself conditioned by international law dealing with:
    - social Rights;
    - minimum standards of social security;
    - fundamental human rights.

When taking a RightServicing initiative on the national level, one has to be ready to:
- eaborate in detail what one would like to realize concretely;
- examine under which aspects the operation might raise legal questions;
- pro-actively describe why the operation is in line with international and eventually EU law;
- take the necessary legal instruments to accompany the operation in order to make the operation fit in with other national law.