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Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law?

A Comparison of Legal Contexts and some Case Law of the EU and the ECHR

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1. Introduction

The principles of equality and non-discrimination are central in European law.[1] Both EU law and the European Convention on Human Rights (ECHR) prohibit discrimination on different grounds, including sex. EU law has a far-reaching impact on national law through the obligation to implement sex equality directives. Up to now, many directives have been adopted in this field and Treaty provisions such as Article 157 TFEU on equal pay between male and female workers have a prominent role. National courts have to apply these provisions as interpreted by the Court of Justice of the EU (the Court of Justice).[2] In the ECHR, the prohibition on discrimination is enshrined in Article 14 (but has an accessory character) and now also applies to social security issues.[3] Protocol 12 contains in addition a general prohibition on discrimination. The interpretation of these provisions by the European Court of Human Rights (ECtHR) is binding. The EU Charter of Fundamental Rights now has the same legal value as the Treaties and the EU will accede to the ECHR (Article 6(1) and (2) TEU). Article 6(3) TEU clarifies that fundamental rights as guaranteed by the ECHR shall constitute general principles of EU law. This provision clearly reflects a will to further synergy in the field of fundamental rights between both European law systems, but the accession of the EU to the ECHR also gives rise to new questions.

Problems might occur when similar cases have to be decided by both courts, in particular when the national law of Member States is at stake which implements EU non-discrimination law. This might for example be the case when no prejudicial question has been asked during procedures. Differences in outcome in very similar cases are obviously also problematic in areas where existing EU case law reflects a different approach compared to the interpretation of the ECtHR. In the field of pensions, for example, some provisions which discriminate directly on the ground of sex are contrary to EU law according to the case law of the Court of Justice, while the ECtHR has considered similar provisions to be objectively justified. Men seeking redress in such cases have therefore been more successful under the ECHR than under EU law.[4] It is submitted that the national courts of the EU Member States should not be confronted with contradictory approaches in similar cases. As stated by the Presidents of both courts, Costa and

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2 Until the entry into force of the Lisbon Treaty on 1 December 2009, the European Court of Justice (ECJ) and now the Court of Justice of the EU (CJEU).

3 Article 14 in relation to Article 1 of the 1st Protocol on the protection of property.

4 See below Section 4.2.

Skouris, in their Joint Communication on the EU accession to the ECHR, it is important to ensure that there is the greatest coherence between the Convention and the Charter.[5] While this is certainly true for states that are EU Member States, it might also have consequences for the Contracting Parties of the Council of Europe (CoE), which are not bound by EU law.

This paper provides an analysis of the legal contexts and some case law in the field of sex discrimination of both European systems. The emphasis lies on diverging approaches which might be problematic, not in the least for individuals who feel that they are victims of discrimination. The central question is therefore not so much whether there is (as yet) coherence between both systems in this field, but rather what both approaches might offer from the perspective of the citizen who seeks protection against sex discrimination. Both courts have interpreted the prohibition of sex discrimination, which is also embedded in the EU Charter of Fundamental Rights in the title on Equality. In addition, the Court of Justice has acknowledged a general principle of discrimination. It is therefore worth analysing the interpretation of both courts in similar cases in order to point to similarities and differences in their approaches with the aim being to find starting points towards more synergy in interpretation in the case law of both courts. Such an analysis first requires a description of the legal framework in which the courts interpret the prohibition of sex discrimination, as there are important differences in this respect.

The central question discussed in this paper is thus which protection against sex discrimination a citizen enjoys when he/she relies on a non-discrimination provision in national law which implements EU law as interpreted by the Court of Justice compared to the protection provided under the ECHR after all national remedies have been exhausted as interpreted by the ECtHR? What are the main similarities and differences between both approaches in similar cases? How are concepts of discrimination, in particular direct and indirect sex discrimination and positive action, conceptualised? The choice of the cases is determined by a few factors (in addition to the limited length of this paper): whether cases concerned sex discrimination; addressed the same or very similar issues; and reflected either similarities or divergences in interpretation. First, after a brief reminder of the different roles of both courts (Section 2.1), the legal context and framework of both systems are described, with specific attention being paid to the principle of equality and non-discrimination (Section 2.2). Section 2.3 offers an overview of the scope of EU sex equality law compared to the ECHR, which might complement EU law. Then follows a comparison of the conceptualisation of the prohibition of sex discrimination in both systems. Section 4 offers a clear example of divergences in approaches to sex discrimination in social security schemes by analysing more in detail two similar cases decided differently by respectively the Court of Justice and the ECtHR. The paper concludes with a few suggestions to further synergies in this field of law.[6]

2. Legal context and framework

2.1. Two European courts

The Court of Justice of the EU and the European Court of Human Rights[7] operate historically within different – though related – legal contexts when interpreting the prohibition of sex discrimination.[8] Both European courts give binding judgments, but their competences and the procedures which are applicable differ considerably. The Court of Justice ensures a uniform interpretation of the Treaties and acts of the

5 See on this issue the *Joint Communication from Presidents Costa and Skouris*, available at: <http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf> (last visited 15 July 2012). In this communication procedural aspects are addressed, which will not be discussed here.

6 The paper reflects the state of affairs until 6 July 2012.

7 Until 1998, there was a different supervisory mechanism, with a role for the European Commission on Human Rights. This system was revised with Protocol No. 11 in 1998 and Protocol No. 14, which entered into force on 1 June 2010.

8 See for comparisons of the approaches of both courts for example: S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*', 2006 *Common Market Law Review* 43, pp. 629-665 and G. Harpaz, 'The European Court of Justice and its Relations with the European Court of human Rights: The Quest for Enhanced balance, Coherence and Legitimacy', 2009 *Common Market Law Review* 46, pp. 105-141. See for a comparison of gender discrimination: S. Besson, 'Gender Discrimination under EU and ECHR Law: *Never Shall the Twin Meet?*', 2008 *Human Rights Law Review*, no. 4, pp. 647-682 and see for an in-depth comparison of EU and ECHR law in the field of non-discrimination and freedom of religion in public employment: S. Haverkort-Spekenbrink, *European Non-Discrimination Law. A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with Emphasis on the Islamic Headscarf Issue* (dissertation Utrecht University), 2012.

institutions such as directives in preliminary rulings (Article 267 TFEU). The national courts of the Member States have the possibility – the highest courts sometimes the obligation – to submit prejudicial questions to the Court of Justice. The questions at stake thus often very much depend on the assessment by national courts whether they should ask preliminary questions and which questions they consider to be relevant in order to decide the case in question. The aim of preliminary rulings by the Court of Justice is thus also to provide guidance in a system of collaboration between the Court of Justice and the national court that has to apply EU law and/or national law in conformity with EU law as interpreted by the Court of Justice.

The EU case law in the field of sex equality is impressive[9] and many of these judgements have had an important impact on EU law more in general, for example on issues of the direct effect of provisions of directives, the obligation for national courts to interpret national law in the light of the aim and wording of EU directives, access to justice and sanctions.[10] In addition, the case law of the Court of Justice reflects a dynamic and purposive interpretation of sex equality provisions. For example, the Court of Justice held in 1976 that Article 119 EEC (now 157 TFEU) not only has an economic, but also a social aim. As such, it contributes to social progress and the improvement of living and working conditions.[11] It ruled that the elimination of sex discrimination belongs to the fundamental personal human rights which are general principles of EU law whose observance the Court has a duty to ensure.[12] In 2000, the Court of Justice even ruled that the economic aim is secondary to the social aim of Article 157 TFEU, which is an expression of a fundamental human right.[13] This dynamic interpretation reflects the increasing importance of fundamental human rights in EU law and might reduce the danger of conflicting interpretations of the prohibition of sex discrimination between both courts.

The ECtHR gives binding judgments in (among other things) individual applications after all domestic remedies have been exhausted (Article 34 and 35(1) ECHR). An individual who is subject to the jurisdiction of a State Party and is an alleged victim of a violation of the Convention has a right to complain (Article 34). The main provision prohibiting discrimination in the ECHR – Article 14 – is not a free-standing provision; it must be invoked in conjunction with another substantive right in the Convention or the Protocols. When a separate breach of a substantive Article has been found, the ECtHR often does not examine a complaint under Article 14, unless discriminatory treatment forms a fundamental aspect of the case.[14] When interpreting Article 14, the ECtHR also applies the provision to the case in question. The respective roles of the two courts are thus different. Article 1 of the 12th Protocol is a free-standing provision. However, only a few Contracting States have ratified this Protocol up to now. The ECtHR interprets the ECHR as a living instrument and it has been submitted that it has recently reinforced protection against discrimination.[15] Both courts adopt a dynamic interpretation of the prohibition of sex discrimination. However, while the case law of the ECtHR is impressive, there are only a few judgements which deal explicitly with sex discrimination; the first one dates from 1985.[16]

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9 In my book on EU and Dutch sex equality law in the field of pay and equal treatment I discuss 120 ECJ judgments up to March 2004, most of them on sex discrimination, see S.D. Burri, *Gelijke behandeling m/v*, 2004. Since then, more judgments have been decided by the Court of Justice. See for a recent overview on sex discrimination: K. Koldinská, 'Case Law of the European Court of Justice on Sex Discrimination 2006-2011', 2011 *Common Market Law Review* 48, pp. 1599-1638.

10 See for example Case 43/75, *Defrenne*, [1976] ECR 455; Case 14/83, *Von Colson and Kamann*, [1984] ECR 1891; Case 152/84, *Marshall*, [1986] ECR 723; Case 222/84, *Johnston,* [1986] ECR 1651 and Case C-271/91, *Marshall*, [1993], ECR I-04367 (*Marshall II*). See further: S. Prechal, 'EU Gender Equality Law: a source of inspiration for other EU law areas?', 2008 *European Gender Equality law Review*, no. 1, pp. 8-14, available at: <http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9> (last visited 7 May 2012).

11 Case 43/75, *Defrenne,* [1976] ECR 455, Paras. 10-12.

12 Case 149/77, *Defrenne*, [1978] ECR 1365, Paras. 26-27.

13 Case C-50/96, *Schröder*, [2000] ECR I-743, Para. 57.

14 See for example C. McCrudden & H. Kountouris, *Human Rights and European Equality Law*, University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper no. 8/2006, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899682> (last visited 13 December 2012).

15 See e.g. R. O'Connell, 'Cinderella comes to the Ball: Art. 14 and the right to non-discrimination in the ECHR', 2009 *Legal Studies* 29, no. 2, pp. 211-229 and C. Danisi, 'How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence', 2011 *International Journal of Constitutional Law* 9, no. 3-4, pp. 793-807.

16 *Abdulazizi, Cabales and Balkandali v UK*, [1985] ECHR (Ser. A), p. 94. See for a broad overview: K. Brayson & S. Millns, 'Gendered Rights on the European Stage: Do Marginalized Groups find a 'Voice' in the European Court of Human Rights?', 2010 *European Public Law* 16, no. 3, pp. 437-454.

2.2. Equality and non-discrimination

2.2.1. EU law

A fundamental principle

The fundamental character and importance of the concept of equality in EU law is firmly rooted in the case law of the Court of Justice. In many judgements the Court has ruled that fundamental rights (including the elimination of sex discrimination) are an integral part of the general principles of EU law, the observance of which the Court assures.[17] Since the Treaty of Amsterdam (ToA) these principles are now also clearly laid down in Treaty provisions and the Treaty of Lisbon emphasizes even further the importance of the principles of equality and non-discrimination as fundamental principles of EU law.[18] The explicit references in the TEU to equality between men and women confirm the fundamental character of this principle in EU law.[19] The case law of the Court on fundamental principles as general principles of EU law, linked to the ECHR, is now codified in Article 6(3) which reads:

> '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, shall constitute general principles of the Union's law.'

The obligation to mainstream equality is now also firmly embedded in the TFEU.[20] In addition, the EU has the competence to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, and age or sexual orientation.[21] However, it should be noted that this enabling Article cannot, as such, bring within the scope of EU law situations which do not fall within the framework of measures adopted on the basis of that article, before the time-limit provided therein for its transposition has expired.[22] Article 157(3) TFEU provides a specific legal basis to adopt measures on equal opportunities and equal treatment between men and women in employment and occupation. Since 2000, five directives have been adopted based on these two enabling provisions. The equal treatment directives now cover equal treatment on the ground of sex (see Section 2.3.1), race and ethnic origin,[23] religion or belief, disability, sexual orientation and age.[24] All these directives apply in the field of (access to) employment, self-employment and vocational training.[25]

Equality in the Charter of Fundamental Rights and the general principle of non-discrimination

With the adoption of the Charter of Fundamental Rights the EU now has its own bill of fundamental rights.[26] The Charter is binding; it has the same legal value as the Treaties (Article 6(1) TEU). The Charter is addressed to the EU institutions, bodies, offices and agencies, and to the Member States when they implement Union law (Article 51(1)).

The EU Charter contains a title on equality (Title III), which includes a general principle of equality before the law (Article 20). This principle can be found in all European constitutions and was recognised

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17 See in particular Case 4/73, *Nold*, [1974] ECR 491; Case 136/79, *National Panasonic*, [1980] ECR 2033 and Case 44/79, *Hauer*, [1979] ECR 3727. In *Rutili* the Court for the first time made an explicit reference to the Convention: Case 36/75, *Rutili*, [1975] ECR 1219.

18 See E. Ellis, 'The Impact of the Lisbon Treaty on Gender Equality', 2010 *European Gender Equality Law Review*, no. 1, pp. 7-13.

19 Articles 2 and 3(2) TEU.

20 Articles 8 and 10 TFEU.

21 Article 19 TFEU (ex Article 13 EC).

22 Case C-427/06, *Bartsch*, [2008] ECR I-7245, which concerned Directive 2000/78.

23 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22.

24 Council Directive 2000/78/EC of 27 November 2000 establishing a legal framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

25 The prohibition of race discrimination (Directive 2000/43) covers, in addition to social protection (including social security and health care), social advantages, education and access to and the supply of goods and services. The scope of the sex equality directives is less broad (see Section 2.3.1.) and the so-called Framework Directive (2000/78) applies only in the field of employment and occupation. See e.g. L. Waddington & M. Bell, 'More equal than others: distinguishing European Union equality directives', 2001 *Common Market Law Review* 38, pp. 587-611 and E. Howard, 'EU Equality Law: Three Recent Developments', 2011 *European Law Journal*, no. 6, pp. 785-803.

26 OJ C 83/02, 30.3.2010, p. 389. See e.g. S. Morano-Foadi & S. Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights', 2011 *European Law Journal*, 2011, no. 5, pp. 595-610.

by the Court of Justice as a basic principle of Community law.[27] A general non-discrimination provision (Article 21 (1)) prohibits discrimination on any ground, including sex, and it reads:

> '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.'[28]

The explanations relating to this Article link it to Article 14 ECHR, stipulating that 'in so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it'.[29] On the one hand, this provision might in practice be limited given the explanation for this Article that '(…) the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law'. The Court has recognised a general principle of non-discrimination with reference to this Article, when there was a link with EU law (see below).

A specific provision in the Charter recognizes the right to equality between women and men in all areas, thus not only in employment; and the possibility of positive action for its promotion (Article 23).[30]

The Charter also guarantees family protection and stipulates this on the reconciliation of family and professional life in Article 33, which reads:

> 'To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.'

Article 52 further defines the scope and the interpretation of rights and principles in the Charter. As far as rights are concerned, Article 52(3) provides that:

> 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

It is certainly not always easy to distinguish rights from principles.[31] The need to make such a distinction seems less important in equal treatment cases. The Court of Justice acknowledged for the first time in *Mangold* a general principle of non-discrimination on grounds of age which belongs to the general principles of EU law and derives from various international instruments and the constitutional traditions common to the Member States.[32] It applied this principle in this case between private parties even before the end of the implementation period for Directive 2000/78.[33] Such a general principle of

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27 Case 283/83 *Racke*, [1984] ECR 3791; Case C-15/95, *EARL,* [1997] ECR I-1961and Case C-292/97, *Karlsson,* [2000] ECR I-2737. These are the cases to which the explanation for Article 20 refer to: OJ C 303, 14.12.2007, p. 24.

28 Article 21(2) stipulates that 'within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'.

29 OJ C 303, 14.12.2007, p. 24.

30 See for an extensive overview: S. Koukoulis-Spiliotopoulos, 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality', 2008 *European Gender Equality Law Review*, no. 1, pp. 15-24. Article 23(2) of the Charter does not amend (according to the explanations for this Article) Article 157(4) TFEU, see Article 52(2) of the Charter.

31 See e.g. C. Hilson, 'Rights and Principles in EU Law: A Distinction without Foundation?', 2008 *Maastricht journal of European and comparative law*, pp. 193-215 and R. Schütze, 'Three 'Bills of Rights' for the European Union', 2011 *Yearbook of European Law*, no. 1, pp. 131-158.

32 Case C-144/04, *Mangold*, [2005] ECR I-9981, Paras. 74-75. According to the Court Directive 2000/78 has the purpose of laying down a general framework to combat discrimination on different grounds. See also Case C-555/07, *Kücükdeveci*, [2010] ECR I-365, Paras. 18-21, with a reference to Case 43/75 (*Defrenne III*) and Article 21(1) of the Charter.

33 See J.H. Jans, 'The effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law. Case C-144/04, *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981', 2007 *Legal Issues of Economic Integration*, no. 1, pp. 53-66.

non-discrimination has been recognised in the case law of the Court in relation to the discrimination grounds of age, sexual orientation (at least implicitly)[34] and sex.[35] In *Test-Achats*, the Court ruled that the derogation in Article 5(2) of Directive 2004/113 on equal treatment between men and women in access to and the supply of goods and services was invalid in the light of Articles 6(2) TEU and 21 and 23 of the Charter.[36] Article 5(2) allowed a derogation from the rule of unisex premiums and benefits in Article 5(1) under certain conditions. The Court considered that the validity of the derogation must be assessed in the light of Articles 21 and 23 of the Charter, since recital 4 of Directive 2004/113 expressly refers to them. This judgement with far-reaching consequences illustrates that the non-discrimination provisions of the Charter are applied by the Court in some cases to review the compliance of provisions of directives with this general principle of non-discrimination. According to the Court of Justice exceptions to the principle of equal treatment are permitted when appropriate transitional periods are provided.[37]

The principle of equal treatment has also been applied by the Court of Justice in relation to parental leave, thus recognizing a general principle of equal treatment in the *Chatzi* case.[38] At stake was the question whether parents of twins are entitled to numerous periods of parental leave equal to the number of children born or only to one (individual) period of parental leave. The Court considered that 'observance of the principle of equal treatment, which is one of the general principles of European Union law and whose fundamental nature is affirmed in Article 20 of the Charter of Fundamental Rights, is all the more important in implementing the right to parental leave because this social right is itself recognised as fundamental by Article 33(2) of the Charter of Fundamental Rights.' The clause at stake in the Framework Agreement on parental leave does not entitle numerous periods of parental leave equal to the number of children born. But the Court concluded that: 'However, read in the light of the principle of equal treatment, this clause obliges the national legislature to establish a parental leave regime which, according to the situation obtaining in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs. It is incumbent upon national courts to determine whether the national rules meet that requirement and, if necessary, to interpret those national rules, so far as possible, in conformity with European Union law.'[39] The national court considered, on the ground of these considerations, that the parents of twins have an individual right to parental leave for each child.[40]

According to Article 53, the level of protection guaranteed by other human rights instruments cannot be restricted by the Charter. This Article, comparable to Article 53 of the ECHR, reads:

> 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

Jacqué submits that read in conjunction with Article 52 of the Charter, this Article shows that the material content of the Convention has been incorporated into EU law.[41]

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34 See A. Veldman, 'Bedrijfspensioenen, geregistreerd partnerschap en het Uniebeginsel van gelijke behandeling', 2011 *Nederlands tijdschrift voor Europees recht*, pp. 278-283.

35 See e.g. A. Pahladsingh & H. van Roosmalen, 'Het handvest van de grondrechten van de Europese Unie één jaar juridisch bindend: rechtspraak in kaart', 2011 *Nederlands tijdschrift voor Europees recht*, pp. 54-61 and S.D. Burri, 'Kroniek gelijke behandeling in het Unierecht', 2011 *Nederlands tijdschrift voor Europees recht*, pp. 139-148.

36 Case C-236/09, *Test-Achats*, not yet reported.

37 See C. Tobler, 'Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres*, Judgment of the Court of Justice of 1 March 2011 (Grand Chamber), nyr', 2011 *Common Market Law Review* 48, pp. 2041-2060.

38 Case C-149/10, *Chatzi*, [2010] ECR I-8489.

39 Paras. 63 and 75.

40 Administrative Court Thessaloniki, No. 1842/2010. Thanks to Sophia Koukoulis-Spiliotopoulos for this information.

41 J.J. Jacqué, 'The Accession of the European Union to the European Convention and Fundamental Freedoms', 2011 *Common Market Law Review* 48, pp. 995-1023, at 1000.

2.2.2. Comparison with the ECHR

The Contracting Parties have to secure the catalogue of human rights of the ECHR to anyone within their jurisdiction (Article 1). As is well known, the Convention's non-discrimination provision (Article 14) has an accessory character. This Article reads:

> '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.'

According to the ECtHR's case law this Article 'complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 (…) does not necessarily presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.'[42] In addition to the fundamental rights listed in the Convention, Article 1 of the 1st Protocol guarantees the protection of property. In the case law of the ECtHR, this right could be invoked in conjunction with Article 14 in social security and welfare benefit cases.[43] Thus discrimination in relation to social advantages is prohibited under the ECHR.[44]

Since the entry into force of the 12th Protocol on the 1st of April 2005, which has now been ratified by 18 Contracting Parties of the Council of Europe (CoE), the principle that 'all persons are equal before the law and are entitled to the equal protection of the law' is an independent principle enshrined in the human rights framework of the Convention and thus complements Article 14. Article 1 of the 12th Protocol provides a general prohibition of discrimination with a non-exhaustive list of grounds, including sex. It reads:

> '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 those mentioned in paragraph 1.'

In the Contracting States that have ratified this Protocol individuals can thus invoke this non-discrimination provision against public authorities not only to combat discrimination related to the grounds mentioned, but on any ground.[45] Protocol 12 has not yet been ratified by all Contracting Parties and at the time of writing only seven Member States of the EU have ratified it.[46] There is thus still no possibility to combat (sex) discrimination under the ECHR system in cases where Article 14 is not applicable in states that have not yet ratified Protocol 12. This gap might be filled in by EU law insofar as a case falls under the scope of EU law (see Section 2.3.2).

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42 See for example *Rasmussen v Denmark*, [1984], ECHR (Ser. A 87), p. 12, Para. 29 and *Abdulaziz, Cabales and Balkandali v UK*, [1985] ECHR (Ser. A), p. 94, Para. 71.

43 See in particular the Cases *Gaygusuz v Austria*, no. 17371/90, [1996] ECHR, 1996-IV and *Stec and others v. United Kingdom*, nos. 65731/01 and 65900/01, [2006] ECHR, 2006-VI.

44 See F. Pennings, 'Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?', 2013 *Utrecht Law Review* 9, no. 1, pp. 118-134.

45 In the Protocol relating to Art. 6(2) TEU on the accession of the EU to the Convention, Article 2 stipulates that 'The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto (…)'. Negotiations on the accession only include Protocols to which all Member States are parties. Protocol 12 is therefore excluded. See for a critique: J.J. Jacqué, 'The Accession of the European Union to the European Convention and Fundamental Freedoms', 2011 *Common Market Law Review* 48, pp. 995-1023, at 1003-1004.

46 The following Member States have ratified Protocol 12: Cyprus, Finland, Luxembourg, the Netherlands, Romania, Slovenia and Spain, and candidate Member State Croatia, state of affairs in May 2012.

The ECHR also provides for minimum protection (Article 53).[47] Thus insofar as EU law (and national fundamental rights) provides more protection against discrimination, EU (and national) law would prevail. In addition, the addressee of the legal norm under the ECHR is the Contracting State, while EU equal treatment legislation applies to all persons in the public and private sector and not only to the state. However, limitations in the personal and material scope of EU sex equality law might lessen the impact of EU law compared to the ECHR in this field, which can then complement EU law.

2.3. Scope

2.3.1. Scope of EU sex equality law

The question whether an issue falls under the scope of EU law, as interpreted by the Court of Justice, is of paramount importance. The scope of EU sex equality law is much more limited compared to the catalogue of fundamental rights of the ECHR; it mainly covers pay, (access to) employment, occupational and statutory social security, self-employment[48] and (access to) goods and services.[49] In addition, the Pregnancy and Parental Leave directives are also relevant in this field.[50] However, within this limited scope, EU law has a great impact on national law and potentially offers many possibilities for individuals to combat discrimination in the EU Member States. This is mainly due to the obligation to transpose EU directives into national law; the well-known issues of the direct effect of some EU anti-discrimination provisions, which can be invoked by individuals before national courts, sometimes not only against (an organ of) the state, but even against private parties; the duty for national courts to interpret national provisions in the light of EU law; and the possibility that Member States are liable in case individuals suffer damage due to an incorrect or non-implementation of provisions of directives.

In EU law, the (material) scope of sex equality provisions (in particular in employment) has been clarified by the Court of Justice in numerous judgments, with sometimes far-reaching consequences for the Member States.[51] Therefore an insight into the scope of EU sex equality provisions is particularly important, since when a situation falls under the scope of both European systems, there is an increased possibility of conflicting interpretations between the ECtHR and the Court of Justice. On the other hand, when a situation does not fall under the scope of EU law, protection against sex discrimination might be provided under the ECHR. This section therefore presents an overview of both the personal and material scope of non-discrimination provisions in employment, with a focus on sex discrimination.

Equal pay for male and female workers

The principle of equal pay and the concept of pay are defined in Article 157 TFEU.[52] This Article has played a primordial role in the case law of the Court of Justice on sex equality. This primary source of law prevails over secondary legislation. This Article has had both a vertical and a horizontal direct effect since 8 April 1976 (the Court limiting the temporal effect of its judgement)[53] and can thus be invoked also in relations between private parties when no national provision is applicable. Article 157 stipulates:

> '1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

47 It reads: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.'

48 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 repeals Directive 86/613, OJ L 180,15.7.2010, pp. 1-6.

49 Directive 2004/113/EC, OJ L 373, 21.12.2004, pp. 37-43.

50 See for an overview of EU gender equality law: S. Burri & S. Prechal, *EU Gender Equality Law. Update 2010*, European Commission 2010, available at: <http://ec.europa.eu/justice/gender-equality/files/dgjustice_eugenderequalitylaw_update_2010_final24february2011_en.pdf> (last visited 8 May 2012).

51 See further S. Prechal & N. Burrows, *Gender Discrimination Law of the European Community*, 1990 and E. Ellis, *EU Anti-Discrimination Law*, 2005.

52 The former Article 119 EEC Treaty and Article 141 EC.

53 Case 43/75, *Defrenne*, [1976] ECR 455.

> 2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
> Equal pay without discrimination based on sex means:
> (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement
> (b) that pay for work at time rates shall be the same for the same job.'

The concept of a 'worker' has an EU law meaning and it cannot be interpreted more restrictively in national law. A worker is a person who, for a certain period of time, performs services for and under the direction of another person in return for which he or she receives remuneration.[54] According to the case law of the Court of Justice, the concept of pay in Article 157 TFEU is very broad. It includes not only basic pay, but also, for example, overtime supplements,[55] special bonuses paid by the employer,[56] travel facilities,[57] compensation for attending training courses and training facilities,[58] termination payments in case of dismissal,[59] and occupational pensions.[60] The Article applies not only to sex discrimination arising out of individual contracts, but also collective agreements and legislation.[61] In particular the extension of the scope of Article 157 TFEU to occupational pensions has been very important and merits specific attention (see Section 4).

No exceptions to the prohibition of direct sex discrimination are allowed in the field of pay, except positive action (see Section 3.1.3). We will see that in particular in the field of pensions and social benefits the approaches of the Court of Justice and the ECtHR to measures that could be qualified as positive action diverge.

Access to employment, employment, occupational pensions and statutory social security

In 2006, the Recast Directive (2006/54) was adopted in which the existing provisions of different sex equality directives are brought together and some case law of the Court of Justice is incorporated.[62] This Directive contains general provisions and definitions of different concepts such as direct and indirect discrimination, harassment and sexual harassment; provisions on equal pay, equal treatment in occupational and social security schemes and on equal treatment as regards access to employment, vocational training and promotion and working conditions. In addition, there are provisions on remedies and penalties, the burden of proof, victimisation, the promotion of equal treatment through equality bodies, social dialogue and dialogue with NGOs.

Particularly relevant for this paper is Article 5 that prohibits both direct and indirect sex discrimination in occupational social security schemes in particular as regards:

> (a) the scope of such schemes and the conditions for having access to them;
> (b) the obligation to contribute and the calculation of contributions;
> (c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

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54 Case 66/85, *Lawrie-Blum*, [1986] ECR 2121, Para. 17. This case concerned the free movement of workers. However, in Case 317/93, *Nolte*, [1995] ECR I-04625 and Case 444/93, *Megner,* [1995] ECR I-04741 the ECJ made clear that the same definition applies in the area of gender discrimination. See also for example Case C-256/01, *Allonby*, [2004] ECR I-873 , Paras. 65-71.

55 Case 300/06, *Voß*, [2007] ECR I-10573.

56 Case C-333/97, *Lewen*, [1999] ECR 7243.

57 Case 12/81, *Garland*, [1982] ECR 359.

58 Case C-360/90, *Bötel,* [1992] ECR I-3589.

59 Case C-33/89, *Kowalska,* [1990] ECR I-2591.

60 Case 170/84, *Bilka*, [1986] ECR 1607 and Case C-262/88, *Barber,* [1990] ECR I-1889.

61 Case 43/75, *Defrenne,* [1976] ECR 455, Paras. 21-22.

62 The Recast Directive had to be implemented by 15 August 2008 and the directives which are brought together in this Directive (Directives 75/117; 76/207, as amended by Directive 2002/73; 86/378, as amended by Directive 96/97 and 97/80) were repealed one year later (Article 34). The Member States must of course meet their obligations arising from all these directives before the end of the various implementation periods. Nearly all the articles in the Recast Directive correspond to existing articles in one or more of the above-mentioned directives.

The categories of persons who are protected are listed in Article 6 and include: 'members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.' The material scope (Article 7) is roughly the same as in Directive 79/7. Both directives apply to statutory schemes that provide protection against sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment.[63] The Recast Directive also applies to other social benefits if they constitute a consideration paid by the employer by reason of the employment relationship and to pension schemes for a particular category of worker such as public civil servants if the benefits are paid by reason of the employment relationship with the public employer.

The Recast Directive has now incorporated most of the case law of the Court of Justice and in Article 9 it provides examples of discrimination in this field. Setting different conditions for the granting of benefits or restricting such benefits to workers of one sex or another in occupational social security schemes is prohibited (Article 9(1)(e)). The same is true for determining different retirement ages in such schemes (Article 9(1)(f)). Suspending the acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer is also prohibited (Article 9(1)(g)).[64]

Directive 79/7 covers statutory social security schemes and prohibits both direct and indirect sex discrimination (Article 4(1)).[65] The personal and material scope of this directive are similar to the provisions on occupational social security schemes. However, an important difference is that this directive allows more exceptions.

Article 4(2) contains an exception for provisions relating to the protection of women on the ground of maternity. Other exceptions are listed in Article 7. The two most important exceptions to this Article are:

- the determination of different pensionable ages for men and women in old-age pensions and retirement pensions;
- certain advantages related to the fact that the persons concerned had brought up children and may have interrupted employment for that purpose.

In the area of statutory schemes some – often rather complex – cases before the Court of Justice revolved around the question of whether a scheme is statutory or occupational and what the consequences may be if there is a close link between the statutory scheme and an occupational scheme. This is particularly important since certain exceptions to direct sex discrimination are allowed under the Statutory Schemes Directive, but not under Article 157 TFEU or the Recast Directive.

Pregnant workers and parental leave

The main aim of the Pregnancy and Maternity Directive (92/85) adopted in 1992 is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding (Article 1).[66] Some provisions of this Directive are closely linked to the principle of equal treatment between men and women in employment. Article 8 of this Directive stipulates, for example, that Member States have to ensure that women enjoy a period of at least 14 weeks' maternity leave. Women on maternity leave are entitled to the payment of and/or an entitlement to an adequate allowance being maintained (Article 11(2)(b)). Furthermore, pregnant

63 The material scope of Directive 79/7 is defined in Article 3. The Directive applies to statutory schemes that provide protection against the following risks: sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment. It also applies to social assistance, but only in so far as it is intended to supplement or replace the statutory schemes covering the above-mentioned risks. Provisions concerning survivors' and family benefits are excluded, except in the case of family benefits granted by way of increases in benefits due in respect of the risks mentioned here.

64 The effect in time has been limited for certain provisions to periods of employment after 17 May 1990 (the date of the *Barber* judgement, Case C-262/88, *Barber*, [1990] ECR I-1889), except for workers who commenced legal proceedings before that date.

65 Directive 79/7/EEC, OJ L 6, 10.1.1979, pp. 24-25.

66 Directive 92/85, OJ L 348, 28.11.1992, pp. 1-7.

women enjoy health and safety protection and protection against dismissal from the beginning of the pregnancy to the end of the maternity leave (Article 10).[67] A proposal to amend this Directive is pending.[68]

The reconciliation of family/private life with work is, according to the Court of Justice, 'a natural corollary to gender equality' and a means for achieving gender equality not only in law but also in the reality of everyday life.[69] Directive 2010/18 sets minimum standards designed to facilitate the reconciliation of work with family life and implements the revised Framework Agreement of the European social partners on parental leave and time off on grounds of *force majeure*.[70] This Agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State. It also applies to part-time workers, fixed-term contract workers and temporary agency workers (Clauses 1(1) and 1(2)). They are entitled to an individual right to (unpaid) parental leave on the grounds of the birth or adoption of a child so as to take care of that child until a given age (up to eight years). The age should be defined by the Member States and/or the social partners. The parental leave shall be granted for at least a period of four months and should, in principle, be provided on a non-transferable basis. To encourage both parents to take leave on a more equal basis, at least one of the four months has to be provided on a non-transferable basis (Clause 2).

2.3.2. Comparison with the ECHR

The catalogue of fundamental human rights of the ECHR includes rights such as, for example, the right to life (Article 2), the right to a fair and public hearing (Article 6), the right to respect for privacy and family life (Article 8), the freedom of thought, conscience and religion (Article 9), the right to marry and found a family (Article 12) and the right to education (Article 18). In addition, in diverse Protocols fundamental rights were added to the list of rights contained in the Convention. In conjunction with Article 14, with its non-exhaustive list of discrimination grounds, the prohibition of discrimination thus applies to very diverse situations; however, the Convention applies primarily in vertical relations that involve a Contracting State. Some provisions have direct (vertical) effect in the Netherlands. An individual cannot rely on the Convention directly against private actors by using the procedure laid down in the Convention.[71]

Some of the rights in the Convention might by limited. Article 8, for example, on the right to respect for private and family life, allows restrictions when the requirements of Paragraph 2 are met:

> '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.'

The prohibition of (sex) discrimination also applies to social advantages benefits, even if they are non-contributory, as long as they fall under the scope of Article 1 of the 1st Protocol (*Stec*).[72] The ECHR can thus complement the prohibition of sex discrimination in EU law, when EU law is not applicable. A clear example is the case of *Wessels-Bergervoet*,[73] in which a citizen could rely on Article 14 in conjunction with Article 1 of Protocol 1, while EU Directive 79/7 on statutory social security[74] was not applicable. Its scope is limited to the working population (Article 2), as was confirmed in the judgements *Achterberg-te Riele*

67 See on absences due to pregnancy-related illness: Case C-394/96, *Brown,* [1998] ECR I-4185, Para. 18.
68 COM(2008) 637.
69 Cases C-243/95, *Hill and Stapleton,* [1998] ECR I-3739; C-1/95, *Gerster*, [1997] ECR I-5253.
70 Directive 2010/18, OJ L 68, 18.3.2010, pp. 13-20, which repeals Directive 96/34.
71 However, there might be some form of *Drittenwirkung*. See on this issue: ECHR, P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights*, 4fth ed. 2006, pp. 28-32.
72 *Stec and others v United Kingdom*, nos. 65731/01 and 65900/01 (admissibility), Paras. 39-56.
73 *Wessels-Bergervoet v the Netherlands*, no. 34462/97, ECHR 2002-IV.
74 Directive 79/7/EEC, OJ L 6, 10.1.1979, pp. 24-25.

and *Verholen*.[75] The Directive does not cover persons who are not working or are not seeking work or persons whose occupation or efforts to find work were not interrupted by one of the risks referred to in Article 3 of the Directive. In all these cases direct sex discrimination in the Dutch General law on old-age insurance was at stake. The *Wessels-Bergervoet* case concerned a married woman resident in the Netherlands whose husband, also a Dutch resident, was not insured because he was exercising an occupation abroad and was insured there. She was not insured for the corresponding period. On the other hand, a married man resident in the Netherlands whose wife was excluded from insurance remained affiliated to the pension scheme. The ECtHR unanimously held in *Wessels-Bergervoet* that there had been a violation of Article 14 in conjunction with Article 1 of Protocol 1.

A situation that also falls outside of the scope of Directive 79/7 was at stake in the *Züchner* case.[76] It concerned the rejection of an application by a spouse for legal aid in order to enable her to challenge the refusal by her husband's sickness insurance fund to grant her any payment in respect of the therapeutic treatment provided by her for her husband. The Court of Justice held that Article 2 of Directive 79/7 'must be interpreted as not covering a person who undertakes, as an unremunerated activity, the care of his or her handicapped spouse, whatever the extent of that activity and the competence required in order to perform it, where the person in question did not, in order to do so, abandon an occupational activity or interrupt efforts to find employment'. It is submitted that in such a case, the ECHR could also complement EU law. Article 6 in conjunction with Article 14 ECHR could be invoked; however, it would probably not (yet) be easy to prove indirect sex discrimination in such a case (see Section 3.2.2).

EU sex equality law might sometimes – unlike the *Wessels-Bergervoet* case – provide stronger protection than under the ECHR, in case of divergent approaches between both courts. This is partly due to the conceptualisation of direct and indirect discrimination in EU law in comparison with the interpretation and application of the principle of non-discrimination by the ECtHR.

3. Concepts of discrimination

In EU sex equality law a different approach is taken to direct and indirect discrimination, both in legislation and in its interpretation by the Court of Justice. The conceptualisation of the prohibition of sex discrimination by the ECtHR is quite different and does not rely on a clear divide between direct and indirect discrimination. The approach to positive action is also different. This section investigates the main differences in conceptualizing (sex) discrimination by both courts.

3.1. EU law

According to well established case law of the Court of Justice discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations.[77] The concepts of discrimination in EU law, in particular the concepts of direct and indirect discrimination, have been developed by the Court and are now codified in the EU non-discrimination directives adopted since 2000. Harassment, sexual harassment and an instruction to discriminate are also prohibited and also defined in recent directives.[78]

In EU equal treatment law specific rules apply to the burden of proof. Article 19(1) of the Recast Directive, for example, describes this as follows:

> 'when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

75 Joined Cases 48/88, 106/88 and 107/88, *Achterberg-te Riele*, [1989] ECR 1963, Para. 13 and joined Cases C-87/90, C-88/90 and C-89/90, *Verholen*, [1991] ECR I-03757, Para. 20.

76 Case C-77/95, *Züchner*, [1996], ECR I-5689.

77 See for example Case C-279/93, *Schumacker,* [1995] ECR 1-225, Para. 30 and Case C-342/93, *Gillespie*, [1996] ECR 1-475, Para. 16.

78 Please note that no attention is paid to these forms of discrimination.

In the following sections, the provisions of Recast Directive 2006/54 are taken as a starting point. This recent sex equality directive repeals some older directives and codifies the sex equality case law of the Court of Justice.

3.1.1. Direct discrimination

Direct discrimination is defined in Article 2(1)(a) of Directive 2006/54 and occurs

> '(…) where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.'

This definition suggests that a person who is treated less favourably should be compared to another person who is in a comparable situation. However, in the majority of cases up until now, the Court has found that there is discrimination when a person has been put at a disadvantage for reasons of being female or male, without engaging in comparisons of the situations. One of the reasons for this is that the issue of comparisons is not always raised by the national court. However, in cases where the national court puts this issue to the Court, the latter will deal with comparisons.[79] A special category is cases of discrimination for reasons of pregnancy and maternity. The Court held that the refusal to appoint a woman because she is pregnant amounts to direct sex discrimination, which is prohibited. The fact that there are no male candidates is not relevant if the reason for not appointing the woman is linked to her pregnancy.[80] In such cases, no comparison is required.[81]

A closed system of exceptions

In the field of employment, direct sex discrimination is prohibited, unless a specific written exception applies; there is thus a so-called closed system of exceptions. There exist three exceptions to the prohibition of direct sex discrimination in employment: occupational requirements (Article 14(2)), the protection of women, in particular in relation to pregnancy and maternity (Article 28(1)) and positive action (Article 3). According to the case law of the Court, these exceptions have to be interpreted strictly. The Court did not accept a general exception covering all measures taken for public safety and ruled that a derogation from an individual right laid down in Directive 76/207/EEC (now repealed by the Recast Directive) must be interpreted strictly.[82]

3.1.2. Indirect discrimination

The concept of indirect discrimination has been developed by the Court of Justice in a series of cases, particularly a set of cases regarding indirect sex discrimination in relation to part-time work. The landmark case for employment is *Bilka*, which concerned access to an occupational pension scheme.[83] In *Danfoss* the Court considered that the criterion of mobility, if it is understood as covering employees' adaptability to variable hours and variable places of work, 'may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly'.[84]

Indirect discrimination is now defined in Article 2(1)(b) of the Recast Directive as follows:

> '(…) where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.'

79 See for instance in the area of equal pay, Case C-132/92, *Birds Eye Walls*, [1993] ECR I-5579.

80 Case C-177/88, *Dekker*, [1990] ECR I-03941, Paras. 15-18. In the Recast Directive the EU legislator has made it clear that the less favourable treatment of a woman related to pregnancy or maternity leave is included in the prohibition of discrimination (Article 2(2)(c)).

81 See e.g. Case C-218/98, *Abdoulaye*, [1999] ECR I-5723.

82 Case 222/84, *Johnston*, [1986] ECR 1651, Paras. 26-27 and Para. 36. See also for example Cases C-273/97, *Sirdar*, [1999] ECR I-07403 and C-285/98, *Kreil*, [2000] ECR I-69.

83 Case 170/84, *Bilka*, [1986] ECR 1607.

84 Case 109/88, *Danfoss*, [1989] ECR 1989 3199, Para. 21.

Presumption of indirect discrimination

The indirect discrimination test in EU law therefore comprises the following elements. The first major question to be answered is whether a measure has a more unfavourable impact on a group of persons of one sex than the other. It is for the applicant to prove that a measure or a practice amounts to indirect discrimination.[85] This can be proved by statistics, which have to be valid and significant. It is up to the national court to draw conclusions based on such statistics. The Court gave some guidance on the use of statistics in *Seymour*.[86] It stated that the best approach to the comparison of statistics is to consider, on the one hand, the respective proportions of men in the workforce able to satisfy a sex-neutral requirement and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce. It is not sufficient to consider the number of persons affected. It must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men are able to satisfy the condition, which could also be the case if the statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period. The Court followed the same approach in the area of statutory social security.[87]

Objective justification

When there is a *prima facie* case of indirect discrimination, the defendant has to provide an objective justification for the indirect discriminatory criterion or practice. Indirect discrimination can be justified if the aim is legitimate and the measures to attain that aim are appropriate and necessary. In *Bilka* the Court ruled that the measures could be justified if they corresponded to a *real need on the part of the undertaking* and are appropriate and necessary to reach that aim. When a measure of social policy is at stake, the aim must correspond to a *necessary aim of social policy*.[88]

The Court of Justice has given some guidance as to arguments that do not justify indirect sex discrimination, such as budgetary considerations. In *De Weerd*, the Court held that 'although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes'. To concede that budgetary considerations may justify indirect sex discrimination 'would be to accept that the application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States'.[89] In *Jørgensen* the Court considered that 'measures intended to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care may be justified if they meet a legitimate objective of social policy, are appropriate to attain that objective and are necessary to that end'.[90]

The arguments put forward have to be specific, and supported by evidence. For example, in *Seymour* the Court considered that mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex; in addition, it was necessary to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim (Paragraph 76).

3.1.3. Positive action

Most EU sex equality directives explicitly allow positive action measures. In the field of pay, Article 157(4) TFEU stipulates:

85 See in particular Case 109/88, *Danfoss*, [1989] ECR 3199, Paras. 10-16; Case C-381/99, *Brunnhofer*, [2001] ECR I-04961, Paras. 51-62; Case C-104/10*, Kelly*, not yet reported, and Case C-410/15, *Meister*, not yet reported.

86 Case C-167/97, *Seymour,* [1999] ECR I-00623, Paras. 58-65.

87 See for example Case C-123/10, *Brachner*, [2011], not yet reported, Paras. 58-68.

88 Case C-171/88, *Rinner-Kühn*, [1989] ECR 2743. The test might be rather strict even in the field of statutory social security in case of indirect sex discrimination: see e.g. Case C-123/10, *Brachner*, not yet reported.

89 Case C-343/92, *De Weerd*, [1994] ECR I-571.

90 Case C-226/98, *Jørgensen*, [2000] ECR I-2447.

> '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 prevent or compensate for disadvantages in professional careers.'

Preamble 22 clarifies that 'given the current situation and bearing in mind Declaration No. 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life'. This is in line with Article 2(4) of Directive 76/207EEC (now repealed by the Recast Directive), which reads:

> '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 first draft of this Article, the idea that the elimination of discrimination involves the adoption of appropriate measures – thus positive action – was included in the definition of equal treatment; however, no reference to indirect discrimination was made. During the negotiations on this draft Article, the reference to appropriate measures was deleted.[91] Positive action has since then been framed in EU law as an exception to the principle of equal treatment, instead of as an integrated part thereof.

The case law of the Court of Justice on positive action in (access to) employment shows that the means to achieve positive action must be proportionate to the aim pursued. A measure that would give automatic and unconditional preference to one sex is not justified in this respect.[92] In the case of recruitment and promotion, targets and/or quotas can only be accepted if each and every candidature is the subject of an objective assessment that takes the specific personal situations of all candidates into account. This case law of the Court of Justice started with the rather severe judgment in *Kalanke*. In the meantime, the Court has softened its position in favour of positive action and it held in *Marschall*: 'it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances'.[93] In *Lommers*, the Court found that measures that gave preference to female employees in the allocation of nursery places, but did not amount to a total exclusion of male candidates, were justified. A preferential allocation of nursery places to women employees was likely to improve equal opportunities for women since it was established that they were more likely than men to give up their careers in order to raise a child.[94] Although, on the one hand, the case was decided in favour of positive measures, on the other, it also illustrated some potential dangers of positive action, in the sense that it continues to stereotype women as care providers.

In EU sex equality law, it is thus crucial to distinguish between the different concepts of discrimination at stake, in particular between direct and indirect sex discrimination, as the concept of indirect discrimination has been applied in many judgements. The case law of the ECtHR reflects a different approach: the test in a case of direct sex discrimination differs profoundly from the EU approach and the concept of indirect discrimination is not (yet) well developed. The ECtHR also differs in its approach to measures that would qualify as positive action measures under EU law.

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91 C. Hoskyns, *Integrating Gender*, 1996, p. 103.
92 Case C-450//93, *Kalanke*, [1995] ECR I-03051.
93 Case C-409/95, *Marschall* [1997] ECR I-6363, Paras. 29-30.
94 Case C-476/99, *Lommers*, [2002] ECR I-02891. See also Case C-158/97, *Badeck,* [2000] ECR I-01875; Case C-319/03, *Briheche,* [2004] ECR I-08807.

3.2. Comparison with the case law of the ECtHR

In discrimination cases, the ECtHR addresses the following questions:

a. Do the facts fall within the ambit of one or more of the substantive Convention provisions?
b. Have persons been treated differently from other persons in similar circumstances?
c. Was the difference in treatment attributable to the state?
d. Was the difference in treatment based on a ground laid down in Article 14?
e. Does the difference in treatment have a 'reasonable and objective justification'?
f. What was the state's margin of appreciation?[95]

Below not all these questions will be addressed and the focus is on the conceptual approaches to direct and indirect discrimination and positive action.[96]

3.2.1. Direct discrimination

According to settled case law of the ECtHR on Article 14 ECHR 'a difference of 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 realised"'.[97] At first sight, this test is quite different from the closed system of exceptions in EU law. However, the prohibition of sex discrimination is interpreted rather strictly. In *Abdulaziz*, the first case on sex discrimination published in 1985, the ECtHR stated that 'although the Contracting States enjoy a certain "margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, the scope of this margin will vary according to the circumstances, the subject-matter and its background'. The ECtHR stated that given the fact that 'the advancement of equality of the sexes is today a major goal of the member States of the CoE, this means that "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention"'.[98] The reference to the equality of the sexes as a major goal reflects a similar approach to EU law, where the fundamental character of equality between men and women is confirmed in the first Articles of the TEU. The test of 'very weighty reasons' has been applied in subsequent (direct) sex discrimination cases.[99] The test applied in *Wessels-Bergervoet* seems slightly stricter when the Court considered that 'very *strong* [emphasis added] reasons would have to be put forward before it could regard a difference in treatment based exclusively on the grounds of sex and marital status as compatible with the Convention'.[100] The Court also declared that one of the factors when determining the scope of the margin of appreciation might be 'the existence or non-existence of a common ground between the laws of the Contracting States'.[101] Such an approach is alien to the EU approach to direct discrimination. The interpretation of the prohibition of direct sex discrimination is thus less strict than under the EU provisions in the field of employment and related areas (see Section 3.1.1)

Two cases in which direct sex discrimination in relation to parental leave was at stake merit attention as the approach of the ECtHR in the second case demonstrates synergy with EU law. In *Petrovic* in 1998, the ECtHR accepted a wide margin of appreciation in refusing fathers the right to a parental leave allowance.[102] It stated that the Austrian state had introduced parental leave and a parental leave

95 See on this issue in particular C. McCrudden, 'Equality and non-discrimination', in D. Feldman QC, *English Public Law*, 2009, pp. 499-571, at 525-531.

96 See for a recent overview of the case law of the ECtHR on sex discrimination: I. Radačić, 'The European Court of Human Rights' Approach to Sex Discrimination', 2012 *European Gender Equality Law Review*, no. 2, pp. 13-22, available at: <http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9> (last visited 13 December 2012).

97 *Abdulaziz, Cabales and Balkandali v UK*, [1985] ECHR (Ser. A), p. 94, Para. 72, with references to earlier case law.

98 *Abdulaziz, Cabales and Balkandali v UK*, [1985] ECHR (Ser. A), p. 94, Para. 78. This test is strictly applied by the ECtHR; see e.g. J. Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', 2004 *Netherlands International Law Review* 51, no. 2, pp. 135-183, at 141.

99 See e.g. *Schuler-Zgraggen v Switzerland*, [1993] ECHR (Ser. A), p. 263, *Karlheinz Schmidt v Germany,* [1994] ECHR (Ser. A), p. 291-B, *Van Raalte v The Netherlands,* no. 20060/92, [1997] ECHR, 1997-I, *Petrovic v Austria,* no. 20458/92, [1998] ECHR, 1998-II.

100 *Wessels-Bergervoet v the Netherlands*, no. 34462/97, ECHR 2002-IV, Para. 49.

101 *Petrovic v Austria*, [1998] ECHR II, Para. 39.

102 *Petrovic v Austria*, {1998] ECHR II, Paras. 34-43, at 41-42.

allowance, which was very progressive in Europe, in a gradual manner. The Court considered it relevant that only a few Contracting States allowed a parental leave allowance for fathers; there was thus no common standard among the Contracting States. However, in a recent case this argument was no longer decisive. In the *Markin* case,[103] on the entitlement of fathers serving in the Russian army to parental leave, the Court overruled *Petrovic*. It now considered that 'society has moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition'. The absence of a common standard cannot now provide a justification, nor can the reference to the traditional perception of women as primary child carers (Paragraph 51). The Court held: 'to the extent that the difference was founded on the traditional gender roles, that is on the perception of women as primary child-carers and men as primary breadwinners, these gender prejudices cannot, by themselves, be considered by the Court to amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation. Nor can the fact that in the armed forces women are less numerous than men justify the disadvantaged treatment of the latter as regards entitlement to parental leave. The Court is particularly struck by the Constitutional Court's intimation that a serviceman wishing to take personal care of his children was free to resign from the armed forces. Servicemen are thereby forced to make a difficult choice between caring for their new-born children and pursuing their military career, no such choice being faced by servicewomen'(Paragraph 58). The *Markin* case thus illustrates a dynamic interpretation of Article 14 (here in conjunction with Article 8) by the Court and its willingness to combat gender stereotypes.[104] The approach in *Markin* fits within the EU policy and case law on the reconciliation of work, private and family life (see Section 2.3.1), in so far as both approaches reflect a sex-neutral approach to parental rights. The existence of gender stereotypes is recognized by both courts; it would seem, however, that the ECtHR in *Markin* is more willing to combat gender stereotypes than the Court of Justice in *Marschall*, for example. It is submitted that the approach of the ECtHR in *Markin* could be a source of inspiration for the Court of Justice not only concerning the issue of reconciliation of work, private and family life, but also in the area of positive action as defined in EU law (see Section 4.2 below).

3.2.2. Indirect discrimination

Up to now, the ECtHR has not explicitly developed a concept of indirect (sex) discrimination, comparable to the EU concept of indirect discrimination. This does not mean that the ECtHR does not address – sometimes even explicitly – forms of indirect discrimination. The concept of indirect discrimination was explicitly recognized for the first time in the case *D.H. and others v Czech Republic*, a case on special schools for Roma children.[105] Potential forms of indirect discrimination are mentioned in earlier case law.[106] There are a few cases in which forms of indirect sex discrimination were at stake, which merit special attention.

Indirect discriminatory effect

In *Hoogendijk*, a decision on admissibility (so extensively reasoned that it certainly merits specific attention), the ECtHR accepted that the introduction of the income requirement in the Dutch AAW (General Invalidity Benefits Act) scheme did in fact have an 'indirect discriminatory effect in respect of married or divorced women having become incapacitated for work at a time when it was not common in the Netherlands for married women to earn an own income from work'.[107] The case is particularly interesting because it addressed the same issue as the Court of Justice had to address in the cases *De Weerd* and *Posthuma-van Damme*.[108]

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103 *Konstnatin Markin v Russia*, no. 30078/06, 7 October 2010 EHRC 2011/4, with annotation by J.H. Gerards and 22 March 2012.

104 See also A. Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', 2011 *Human Rights Law Review* 11, no. 4, pp. 707-738.

105 *D.H. and others v The Czech Republic*, no. 57325/00, 13 November 2007, Paras. 188-189, EHRC 2008/5, with annotation by A.C. Hendriks. See for a similar Case: *Orsus and others v Croatia*, no. 15766/03, 16 March 2010, EHRC 2010/59, with annotation J.H. Gerards.

106 See for example the Case *Hugh Jordan v the United Kingdom*, no. 24746/94, 4 August 2004, Para. 154 and *D.H. and others v The Czech Republic*, no. 57325/00, 13 November 2007, Paras. 188-189.

107 *Hoogendijk v The Netherlands*, no. 58641/00, EHRC 2005/24, with annotation by J.H. Gerards.

108 Case C-343/92, *De Weerd*, [1994] ECR I-571 and Case C-280/94, *Posthuma-van Damme*, [1996] ECR I-179.

In *Hoogendijk* the ECtHR applied the following test. It first stated in general terms that 'where a general policy or measure has a disproportionately prejudicial effect on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group'. As regards the use of statistics, the Court considered that in themselves these are not automatically sufficient for disclosing a discriminatory practice. The statistics submitted by the applicant demonstrated that a group of 5,100 persons had lost their entitlements to the *AAW* benefit because they did not meet the requirement income introduced in the amended law. This group consisted of about 3,300 women and 1,800 men. The Court accepted the indirect discriminatory effect of the income requirement in respect of married or divorced women having become incapacitated for work at a time when it was not common in the Netherlands for married women to earn their own income from work.

Burden of proof

In *Hoogendijk* the Court defined the burden of proof as follows: 'where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination'. The Government did not submitted such objective factors and therefore the presumption of indirect sex discrimination was established on the ground of the above-mentioned statistics.

Reasonable and objective justification

The ECtHR then considered in *Hoogendijk* whether there was a *reasonable and objective justification* for the introduction of the income requirement in the *AAW*. The Court considered this requirement to be objectively justified. The income requirement was applicable to both men and women irrespective of their marital status and was introduced in the *AAW* scheme in order to remove the discriminatory exclusion of married women from this scheme whilst seeking to keep the costs of the *AAW* scheme within acceptable limits. The ECtHR considered it not unreasonable to change the nature of the scheme from an insurance against loss of income opportunities to an insurance against loss of income, even if fewer women than men could meet the new income requirement.

Similarities and differences

The interpretation of the concept of indirect discrimination by the ECtHR in the *Hoogendijk* case is rather similar to the EU concept of indirect sex discrimination, the test is a two-step test in both cases with a similar burden of proof. However, there are some differences. First it would seem that the requirements that apply to statistics is stricter in *Hoogendijk*: the ECtHR requires *undisputed official statistics*. However, in *D.H. v The Czech Republic* (a case on special schools for Roma children) the ECtHR recognized the importance of statistics, but also stated that it is ready to accept various types of evidence. It considered that 'when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence'.[109] The ECtHR stated further in *Hoogendijk* that if the rule affects *a clearly higher percentage* of women than men, there is a presumption of indirect sex discrimination. It is not yet clear whether the ECtHR would conclude that there is a presumption of indirect discrimination if the 'statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period', as the Court of Justice accepted in *Seymour* (see Section 3.1.2).

As regards the burden of proof, the respondent Government has 'to show' that this is the result of objective factors unrelated to any discrimination on the ground of sex. In EU law, it is for the respondent

109 *D.H. and others v The Czech Republic*, no. 57325/00, 13 November 2007, Para. 188, EHRC 2008/5, with annotation by A.C. Hendriks.

'to prove' that there has been no breach of the principle of equal treatment. Hendriks suggests that the burden of proof in EU law is heavier for the respondent than according to the case law of the ECtHR.[110] In my view, this might be too literal an interpretation of the consideration of the ECtHR: the main issue at stake here is that the onus shifts to the respondent.

The objective justification test is slightly different. The ECtHR required in *Hoogendijk* a *reasonable and objective justification*. This test is less strict than the objective justification test in case of indirect sex discrimination in EU law. In this case the ECtHR did not refer to the 'very weighty reasons' test as in direct discrimination cases (see Section 3.2.1). In addition, the ECtHR accepted budgetary arguments. Introducing an income requirement in the *AAW* scheme and thus altering the nature of the scheme in order to limit the costs provides a reasonable and objective justification. The Court of Justice considered in *Posthuma-van Damme,* in which the same scheme was at stake, that other aims of social policy than budgetary considerations could justify indirect sex discrimination. We have seen that in EU law budgetary considerations cannot in themselves justify indirect discrimination (Section 3.1.2). The cases of *De Weerd*, *Posthuma-van Damme* and *Hoogendijk* illustrate that both courts applied the concept of indirect discrimination and concluded that the measure was objectively justified. However, the approach of both courts differs as regards the possibilities to justify such discrimination with budgetary considerations.

In a more recent case, *Zarb Adami*, no direct sex discrimination was at stake.[111] The ECtHR however addressed implicitly the issue of indirect sex discrimination. The available statistics showed that many more men than women had fulfilled the civic obligation of jury service, even if the relevant legislation did not make a difference between women and men in this respect. Without using the concept of indirect discrimination explicitly, the ECtHR held that the discrimination at issue was based on a well-established practice, characterised by a number of factors, such as the manner in which the lists of jurors were compiled and the criteria for an exemption from jury service. According to the Court potentially discriminatory measures might not only arise from a legislative measure, but also from a *de facto* situation.

As regards an objective and reasonable justification, the test applied is that 'the difference in treatment pursued a legitimate aim and that there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.' This test sounds quite similar to the indirect sex discrimination test in EU law. However, an important difference concerns the proportionality test: the ECtHR test does not require that the means to achieve the legitimate aim are appropriate *and necessary* (emphasis added). 'A reasonable relationship of proportionality' seems at first sight less strict. Nevertheless, the ECtHR did not accept the arguments of the Maltese Government, which explained rather the mechanisms which led to the difference in treatment, but which were not valid arguments to provide a proper justification (Paragraphs 81-82).

It is submitted that even if the ECtHR has not yet not explicitly developed a concept of indirect discrimination, the approach to issues which can be characterised as indirectly discriminatory shows quite some synergies with the EU concept of indirect discrimination, even if there are still some differences in both approaches.

3.2.3. Same treatment of different situations and the correction of factual inequalities

The ECtHR considered in *Thlimmenos* that the right not to be discriminated against under Article 14 in the enjoyment of the rights guaranteed under the Convention is also violated 'when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.[112] Not every difference in treatment will amount to a violation of Article 14, but 'an issue will arise under Article 14 when it is demonstrated that States treat differently persons in analogous situations without providing an objective and reasonable justification, or when States without an objective and reasonable reason fail to treat differently persons whose situations are significantly different'.[113]

In *Stec* the Court considered that 'Article 14 does not prohibit a State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to

110 See on this issue A. Hendriks, 'EVRM neemt discriminatiejurisprudentie HvJ EG indirect over', 2005 *NJCM-Bulletin*, no. 4, pp. 444-454, at 454.
111 *Zarb Adami v Malta*, no. 17209/02, 20 June 2006, EHRC 2006/115, with annotation by J.H. Gerards.
112 Case of *Thlimmenos v Greece*, no. 34369/97, [2000] ECHR, 2000-IV, Para. 44. This was not a sex discrimination case, however.
113 *Hoogendijk v The Netherlands*, no. 58641/00.

correct inequality through different treatment may in itself give rise to a breach of the Article'.[114] A differentiation might thus be required in order to remedy factual inequalities, an approach that reveals a more substantive concept of equality and shows similarities with the positive action approach under EU law.[115]

4. Divergences in approaches to sex discrimination in social security schemes

As discussed above, even if the legal contexts are quite different, the interpretation by both courts of the prohibition of sex discrimination also show quite some similarities. There are examples of rather timid synergies, e.g. the interpretation of the principle of non-discrimination in indirect discrimination cases (see Section 3.2.2). This section analyses a clear example of diverging approaches to direct sex discrimination and positive action in social security schemes.

4.1. EU law

Which exceptions apply in case of direct sex discrimination depends on the provisions in question (see Section 2.3.1). In *Defrenne I* the Court of Justice had to consider the relationship between the concept of pay in Article 157 TFEU and social security systems. The Court ruled that although consideration in the form of social security benefits is not alien to the concept of pay, this concept does not include those social security schemes or benefits, in particular retirement pensions, which are directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, and which apply, on an obligatory basis, to general categories of workers. These schemes ensure certain benefits for workers which are not so much a matter of the employment relationship, but rather a matter of – general – social policy.[116] After the *Defrenne I* judgement, the Court of Justice was also confronted with cases on pensions. Since *Bilka*, it is clear that an occupational pension scheme that supplements social benefits paid under national legislation and that forms an integral part of the employment contract falls under the concept of pay in Article 157 TFEU.[117] After a period of uncertainty about the question whether and how far occupational pensions are covered by the equal pay principle, the Court of Justice decided in the famous *Barber* judgment, building on what it had already said in *Defrenne I*, that Article 157 TFEU does apply to schemes which are:

i) the result of either an agreement between workers or employers or of a unilateral decision of the employer;
ii) wholly financed by the employer or by both the employer or the workers; and
iii) where affiliation to those schemes derives from the employment relationship with a given employer.

In *Barber*, a so-called 'contracted-out' scheme was at stake, which substituted, in part, the statutory social security scheme with different pensionable ages for women (60 years) and men (65 years). In the early retirement pension of the employer in case of compulsory redundancy women were entitled to such a pension five years earlier than men (50 and 55 years). The total benefits paid to women were higher than for men. The Court of Justice held that Article 157 TFEU prohibits any discrimination in pay between men and women, whatever the system that gives rise to such inequality. It ruled that the difference in the pensionable age in the early retirement scheme was contrary to the principle of equal pay between men and women and could not be justified.[118] The *Barber* judgment and the following case law had the effect, *inter alia*, that certain aspects of Directive 86/378 on occupational schemes were contrary to Article 157 TFEU and had to be amended. These provisions are now included in Title II, Chapter 2 of the Recast

114 *Stec and others v United Kingdom*, nos. 65731/01 and 65900/01, [2006] ECHR, 2006-VI, Para. 51.
115 When an individual remedy is required, the approach is similar to the obligation for the employer to provide reasonable accommodation (for disabled persons) as stipulated in Article 5 of Directive 2000/78.
116 Case 80/70, *Defrenne*, [1971] ECR 445. This distinction between statutory social security schemes and occupational schemes of social security has induced the EU legislator to adopt two different directives, one in 1978 on statutory schemes, and another in 1986 on occupational schemes: Directive 79/7/EEC, OJ L 6, 10.1.1979, pp. 24-25 and Directive 86/378, OJ C 19, 24.1.2009, pp. 9-19.
117 Case 170/84, *Bilka*, [1986] ECR 1607, Paras. 20-23.
118 Case C-262/88, *Barber*, [1990] ECR I-1889. The effect in time of this judgement was limited to the date of the judgment: 17 May 1990.

Directive (2006/54).[119] This case law also had a considerable impact on equal treatment in occupational pension schemes in those Member States where it had been believed that Article 157 TFEU was not applicable and certain forms of direct discrimination were still allowed.

With *Beune*, it became clear that a civil service old-age pension scheme paid by the public employer, which essentially related to the employment of the worker, even if it was governed by statute, also fell under the scope of Article 157 TFEU. The decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer. The application of different rules to calculate the pension of former male married civil servants compared to former female married civil servants was contrary to the principle of equal pay.[120]

The pensions provided under the French retirement scheme for civil servants at stake in the *Griesmar* case also fell under the scope of pay. The pension was determined directly by the length of service, there was a link between the salary earned at the end of the service and the amount of the pension and the decisive criterion that the pension was paid by reason of the employment relationship was satisfied.[121] The service credit to which mothers but not fathers were entitled was thus contrary to the principle of equal pay, unless the situation of female workers and male workers who have children was not comparable or the positive action exception would apply. The Court considered that when the credit is designed to offset the occupational disadvantages which female workers face when they are absent from work during a period following childbirth, the situation of a male worker is not comparable to that of a female worker. According to the Court the granting of the credit was not linked to maternity leave or disadvantages that occur due to being absent from work during a period after childbirth. The credit was related to the upbringing of children and it was taken for granted that children were brought up at the home of their mother. The Court considered that the situation of a male civil servant and a female civil servant may be comparable as regards the raising of children. It held that 'the fact that female civil servants are more affected by the occupational disadvantages entailed in bringing up children, because this is a task generally carried out by women, does not prevent their situation from being comparable to that of a male civil servant who has assumed the task of bringing up his children and has thereby been exposed to the same career-related disadvantages' (Paragraph 56). There was thus a difference in treatment on the grounds of sex between female civil servants who have brought up children and to male civil servants who have in fact assumed the task of bringing up children. The positive action exception was not applicable, according to the Court, because the measure 'does not appear to be of a nature such as to offset the disadvantages to which the careers of female civil servants are exposed by helping those women in their professional life. On the contrary, that measure is limited to granting female civil servants who are mothers a service credit at the date of their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career' (Paragraph 65). The principle of equal pay was thus infringed.

Griesmar illustrates the importance of determining whether pay is at stake or a statutory social security provision. Directive 79/7 allows certain advantages related to the upbringing of children, while such an exception does not exist in the field of pay if it is not considered to be a positive action measure allowed under EU law. The approach of the concept of positive action in *Griesmar* was criticised by AG Jääskinen in his opinion in the *Amédée* case.[122] The Advocate General stated that the Court in *Griesmar* had applied a narrow interpretation of disadvantages 'during the professional career', excluding compensatory measures upon retirement. He stated: 'Cela revient à créer une obligation pour les États membres de pétrifier l'inégalité économique qui existe entre les femmes et les hommes y compris au cours de leur retraite, (…), ce qui me semble peu compatible avec le principe de non-discrimination' (Paragraph 58). AG Jääskinen considered that in the light of the EU case law on pay in relation to pregnancy and positive action, Member States have only limited possibilities to compensate the disadvantages women face in their professional careers due to parental responsibilities. Therefore, he saw credits in the field of pensions being often the only means to compensate such inequality (Paragraph 59). The referring national court

119 Directive 2006/54/EC, OJ L 204, 26.7.2006, pp. 23-36.
120 Case C-7/93, *Beune*, [1994] ECR 4471.
121 Case C-366/99, *Griesmar*, [2001] ECR I-9383.
122 Opinion of 15 December 2011, Case C-572/10, which was only available in French while the case was pending.

then withdrew these prejudicial questions and the case was withdrawn from the register of the Court.[123] It is submitted that legislation which was at stake in the *Griesmar* case does not contribute to a more equal sharing of care responsibilities between men and women; it even reinforces gender stereotypes as regards their respective caring roles. The exclusion of fathers who could show that they have brought up their children (for example, single fathers with children) is in my view regrettable. A nuanced approach to such measures would be preferable. Credits in relation to the upbringing of children could, for example, also take into account the fact that in particular older generations of women have probably suffered much more disadvantages in relation to parenting than younger women.[124] A more nuanced approach might provide possibilities to avoid levelling down the granting of such credits as has taken place in French legislation after the *Griesmar* judgment.

4.2. Comparison with the case law of the ECtHR

A very similar case to *Griesmar* was decided by the ECtHR in the *Andrle*[125] case, in which the ECtHR unanimously chose to adopt a quite different approach compared to the Court of Justice in *Griesmar*. The *Andrle* case was severely criticized.[126] In both cases, men lodged complaints. In the *Andrle* case, a statutory retirement scheme established a different pensionable age for women who had raised children than for men; women were entitled to a lower pensionable age depending on the number of children. Mr Andrle had cared for his two minor children himself, but did not receive a retirement pension at a lower age than other men. In this case Article 1 of the 1st Protocol and Article 14 were applicable.

The ECtHR emphasized in *Andrle* that pension systems constitute the cornerstones of modern European welfare systems. The features of pension systems – stability and reliability – allow for lifelong family and career planning. The Court therefore held that 'any adjustments of the pension schemes must be carried out in a gradual, cautious and measured manner. Any other approach could endanger social peace, foreseeability of the pension system and legal certainty' (Paragraph 51). The ECtHR acknowledged that 'in the former Czechoslovakia, the more favourable treatment of women who raised children 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' (Paragraph 53). The Court found that this measure pursued a legitimate aim. The question whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized was answered in the light of the historical and societal context in the Czech Republic. In such complex issues relating to economic and social policies, national authorities enjoy a wide margin of appreciation according to the Court. It acknowledged the changes made in legislation towards a further equalization of the retirement age. It distinguished this case from the approach taken in *Markin*, in which direct sex discrimination in access to parental leave was at stake, stating that parental leave is a short-term measure (see Section 3.2.1). The Court found in conclusion that 'the original aim of the differentiated pensionable ages based on the number of children women raised was to compensate for the factual inequality between men and women. In the light of the specific circumstances of the case, this approach continues to be reasonably and objectively justified on this ground until social and economic changes remove the need for special treatment for women. In view of the time-demanding pension reform which is still ongoing in the Czech Republic, the Court is not convinced that the timing and the extent of the measures undertaken by the Czech authorities to rectify the inequality in question have been so manifestly unreasonable as to exceed the wide margin of appreciation allowed in such a field' (Paragraph 60).

The care credits in relation to pension rights at stake in the *Griesmar* and the *Andrle* cases were not attributed in a sex-neutral way and might therefore reinforce gender stereotypes on the caring role of

123 Order 28 March 2012, C-572/10.

124 See for example J.H.Wiggers, *Recht doen aan gelijkheid. Een beschouwing over voorkeursbehandeling en de betekenis van het gelijkheidsbeginsel in het grensgebied van recht en sociaal-politieke ethiek*, 1991, p. 267 and S. Renga et al., 'Old-age pension rights for women in three European countries. Which equality?', 2010 *European Gender Equality Law Review*, no. 1, pp. 14-32.

125 *Andrle v The Czech Republic*, no. 6268/08, 17 February 2011, EHRC 2011/60, with annotation by A.F.M. Leijten & A.S.H. Timmer.

126 See K. Koldinská, 'Shouldn't fathers raise their children? Two ECHR and ECJ Cases on gender equality in pension rights', 2011 *European Gender Equality Law Review*, no. 2, pp. 14-20.

women. The approach of the ECtHR does not contribute to weakening such stereotypes, contrary to the *Markin* case. The *Griesmar* case has led to a levelling down at the end of the day. It is submitted that both outcomes are unsatisfactory. Care credits should in my view be related to care and therefore be attributed on a sex-neutral basis. Such a starting point is in the first place the responsibility of the Member States. However, as long as care credits are only attributed to women in national law, more synergy could be reached between the case law of both courts with a nuanced and differentiated approach to compensating measures, thereby avoiding reinforcing gender stereotypes. Such an approach could for example take into account the position of older women and single fathers in relation to care, in the light of the historical and societal context. In addition, time limits could be imposed, specifying until when certain care credits for women would be allowed. General assumptions about the caring role of women only could then be avoided, an approach which at the end of the day would benefit both women and men with caring responsibilities.

5. Conclusions

The principles of equality and non-discrimination belong to the fundamental principles of both European law systems. The fundamental character of gender equality and the prohibition of sex discrimination is recognised in both bodies of law, notwithstanding the different background of the European systems: the economic background of the EU and the human rights background of the ECHR. It is submitted that this starting point allows for more synergies in the approaches to the issue of sex discrimination. The above analysis shows some similarities, but also quite important differences. These are not only due to the different legal frameworks, but also to diverging interpretations of concepts of discrimination by the Court of Justice and the ECtHR.

There are in the first place clear differences in the personal and material scope of the legal provisions. Even if the scope of EU non-discrimination law has been broadened with the adoption of new directives since 2000, EU sex equality law still primarily covers pay, (access to) employment, statutory social security, self-employment, (access to) goods and services and pregnancy and parental leave. In the field of statutory social security, the personal scope is rather limited. In this respect, the ECHR can complement the protection afforded under EU law, in particular when Article 1 of the 1st Protocol is applicable (*Stec*, *Wessels-Bergervoet*). For individuals it is thus worth lodging a complaint based on the ECHR and its Protocols, in cases which fall outside the clearly delimited scope of EU sex equality law. The entry into force of the 12th Protocol – with an independent non-discrimination provision in Article 1 – offers even further possibilities to complement the protection against sex discrimination under EU law.

When a situation falls under both EU non-discrimination law and the ECHR and its Protocols, the national courts of the EU Member States might be confronted with diverging interpretations. This might be particularly problematic when they have to interpret national law that has been implemented in accordance with EU law. Suggestions for nuanced and differentiated approaches were submitted, which would contribute to further synergy between the case law of both courts. Meanwhile, in case of diverging interpretations, the highest level of protection should be applied according to both systems.

The above comparison shows that concepts of discrimination are more developed in EU law, particularly in the case law of the Court of Justice and its codification in non-discrimination directives than in the case law of the ECtHR. This is particularly true for the issue of sex discrimination. Concepts of direct and indirect discrimination and the burden of proof, for example, are clearly defined in directives and interpreted in many judgments of the Court of Justice. The EU directives allow only certain exceptions to direct sex discrimination, which have been interpreted strictly. The prohibition of sex discrimination in relation to pregnancy provides far-reaching protection (*Dekker*). In EU sex equality law, it is crucial to distinguish under which provision a form of sex discrimination falls given the fact than in some fields more exceptions are allowed (e.g. statutory social security) than in others (e.g. equal pay). Direct discrimination in relation to the pensionable age in occupational and statutory schemes clearly illustrates this point. The ECtHR applies a rather different test in cases of direct sex discrimination, leaving more room for arguments which might justify such discrimination. The strict approach to direct sex discrimination in EU law contrasts with the more lenient approach of the ECtHR, in particular

in the field of social policy, where sometimes the 'very weighty reasons' test is hardly applied and the Contracting Parties enjoy a wide margin of appreciation (*Andrle*). However, the ECtHR has also recently found that direct sex discrimination in access to parental leave in the military could not be objectively justified (*Markin*). Clear examples of synergy have been found when the Court of Justice has first decided on the same issue (*Stec*).

The concept of indirect (sex) discrimination is quite developed under EU law, but not (yet) in the case law of the ECtHR. The concept was for the first time explicitly recognized by the ECtHR in the *DH* case in 2007; however, this was not a sex discrimination case. In this area, few cases illustrate the ECtHR approach to indirect sex discrimination up to now (*Hoogendijk*, *Zarb Adami*). These cases show some differences in approach between the EU and the ECtHR, in particular on the use of statistics and the objective justification test, even if the test to decide whether there is prohibited indirect sex discrimination is rather similar. While the Court of Justice held that budgetary considerations cannot in themselves constitute the aim pursued by social policy (*De Weerd*), the ECtHR accepted such arguments in *Hoogendijk* – where the same scheme was at stake. It is submitted that as regards budgetary considerations, the ECtHR could further synergy by adopting the well-established case law of the Court of Justice on this point. The ECtHR might develop a test of indirect discrimination in future case law that shows more similarities to the EU conceptualisation of this concept. EU law and its interpretation by the Court of Justice being of chief importance for the ECtHR,[127] the development of the concept of indirect discrimination might provide an opportunity for more synergy and thus better protection for individuals against such forms of discrimination.

In EU law, positive action has up to now not been interpreted as an intrinsic component of a conceptualisation of the principle of equality, but rather as an exception to the principle of equal treatment. The case law of the Court of Justice merely reflects this approach. The ECtHR accepts that sometimes groups have to be treated differently in order to correct 'factual inequalities' (*Stec*). Such an approach might leave more room for compensating measures than under EU law. It is submitted that the case law of the ECtHR might offer opportunities to develop a more substantive approach to equality – including the conceptualisation of positive action – in EU law, in particular when a nuanced and differentiated approach would be developed

The aim of this contribution was to identify in a specific field certain similarities and differences in the approaches to the prohibition of sex discrimination in the two European systems. Some further questions arise. For example, which opportunities for enhanced synergy will the accession of the EU to the ECHR offer? Which impact will the EU Charter of Fundamental Rights have on the sex discrimination case law of the Court of Justice? What are the advantages, but also the dangers of an approach towards more synergy from the perspective of the individual who seeks protection against sex discrimination? What about the legitimacy of EU law standards when they are applied to Contracting Parties of the CoE which have not been involved in the legislative process within the EU? Which problems confront national courts in the case of conflicting interpretations of the prohibition of sex discrimination? Gerards suggests in answer to some of these questions that a 'doctrine of deference' should be developed for the EU courts, sometimes allowing a marginal review. However, in some cases, in particular when fundamental rights are at stake, there might be good reasons for an intense review of the measures at stake.[128] Such issues certainly merit further research.

In some cases, the courts have recognized that sex discrimination is linked to gender stereotypes which disadvantage women (*Marschall*, *Markin*). Combating gender stereotypes clearly fits within the approach that is enshrined in CEDAW, in particular Article 5, which offers a challenging conceptualisation of gender equality.[129] Such an approach might help to further synergy in the interpretation of the prohibition of sex discrimination by both courts. Hopefully, the present legal analysis will inspire individuals, lawyers and NGOs and enable those who wish to combat sex discrimination to make better use of all the possibilities that both European systems offer to advance gender equality.

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127 J.H. Gerards, *EVRM-algemene beginselen*, 2011, pp. 86-89.

128 J.H. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 2011 *European Law Journal*, no. 1, pp. 80-120.

129 See R. Holtmaat & C. Tobler, 'CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination', 2005 *Maastricht Journal of European and Comparative Law*, no. 4, pp. 399-425.