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GENDER DIFFERENCES IN SOCIAL PROTECTION

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1. Introduction

Equality between women and men is an emanation of the fundamental legal principle of equality. It is also one of the European Union's founding principles. It goes back to 1957 when the principle of equal pay for equal work became part of the Treaty of Rome.¹ Later on this principle has been extended also to social security schemes.

Equality between women and men or men and women² is still high on the EU agenda.³ It is believed that improving equality between women and men is essential to the EU's response to the current economic crisis, according to the European Commission's latest annual report on gender equality.⁴ Equal treatment of women and men should be understood as contributing to economic success.⁵ Therefore, in August 2012 the EU has launched a new program called Equality Pays Off.⁶

Before tackling gender differences in social protection, which is the purpose of the present report, the EU competence in harmonising social protection schemes (with respect to equal treatment of women and men) is discussed. This will be followed by a brief historical overview and a short description of methodology and structure of the report.

¹ The EEC Treaty became applicable as of the beginning of 1958.

² In the primary legislation of the EU men and women are alternately mentioned first. Although not contributing to more equality as such, it is a symbolic gesture emphasising that both form equal parts of humanity. Arts. 2 and 3 TEU (placing women first) and Arts. 8, 153, 157 of the TFEU (mentioning men first).

³ For instance Communication from the Commission, Strategy for equality between women and men 2010-2015, COM(2010) 491 final, Brussels, 21.9.2010. Gender equality is also mentioned among the key messages of the Draft Joint Report on Social Protection and Social Inclusion 2010.

⁴ Progress on equality between women and men in 2011, European Commission SWD(2012) 85 final, Brussels, 16. 4. 2012, for the first time annexed to the (2011) Report on the application of the EU Charter of Fundamental Rights.

⁵ Ibid.

⁶ It aims at supporting the efforts of companies in tackling one of the major challenges of the future (skills shortage) by promoting equality between men and women, thereby reducing the gender pay gap (http://ec.europa.eu/justice/gender-equality/equality-pays-off/index_en.htm, August 2012). The latter is often reflected in social protection systems.

1.1. Purpose of the report

The present report is limited to exploring gender differences in social protection schemes of the MISSOC countries. It aims to identify common principles, mechanisms and tendencies of a topical issue of gender differences in social protection. It is limited in scope and length.

In its substance it is focused on the statutory social security and social assistance schemes, in the EU context commonly referred to as social protection.⁷ *De iure* and some *de facto* differences between men and women in these schemes in the MISSOC countries are explored. A legal analysis is performed and it is tested whether gender differences in social protection still exist. Detailed statistical information could be used from other than MISSOC sources at a later stage when possible cooperation with expert groups dealing specifically with gender differences might be agreed upon.

Gender equality in social protection is part of the broader equality between women and men (covering also other fields of human activities) and even the wider equality principle as such (prohibiting discrimination on various grounds).⁸ Although recognised as important, the report will deal neither with multidimensional (differences based not only on sex, but at the same time on age, nationality, racial or ethnic origin, religion or belief, sexual orientation, etc.),⁹ nor with intersectoral issues of gender equality (gender differences in family, labour, decision making, research, etc.).

It will also not tackle private occupational schemes, where gender differences are clearly prohibited. This is also due to the Court of Justice of the EU (CJEU) leading decision in the case *Barber*,¹⁰ reflected in the recast Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.¹¹

⁷ The notion of social protection is anchored already in the 1989 Community Charter of the Fundamental Social Rights of Workers. Under its point 10, social security and social assistance are mentioned. According to the Recommendation 92/441/EEC on common criteria concerning sufficient resources and social assistance in social protection systems (OJ L 248, 26. 8. 1992), “the implementation of a guarantee of resources and social assistance comes within the sphere of social protection.”

The notion of social protection may go beyond social security and social assistance. For instance, in case C-228/94 *Atkins* [1996] ECR I-3657 the Commission argued “that the scope of Directive 79/7 is wider than the scope of social security and social assistance and that it extends to social protection as a whole.” The case concerned concessionary fares on public passenger transport services.

⁸ C.f. Art. 19 of the TFEU. The equality principle stems from the French Revolution (values are not only *liberté* and *fraternité*, but also *égalité*).

⁹ Also, the Communication from the Commission, Strategy for equality between women and men 2010-2015, COM(2010) 491 final, Brussels, 21.9.2010, p. 11, expressly acknowledges the aggravated consequences of discrimination on two or more grounds.

¹⁰ Case C-262/88 *Barber* [1990] ECR I-1889.

¹¹ OJ L 204, 26.7.2006.

The present report is a report in the field of social protection, i.e., (statutory) social security and social assistance. Therefore, dealing with general societal labour law (including occupational health and safety at work, which is part of labour law at least when concerning workers) and tax law dimensions of gender differences is outside the scope of the present report.

1.2. EU competence in harmonising social protection schemes

The Treaty of Rome provided legal bases not only for the coordination of national social security systems of the Member States, but also for gender equality. It could be argued that both fields present the two pillars of the EU social security (hard) law.¹²

The EU social security coordination law¹³ links distinctive national social security systems. It is a mechanism designed to abolish the obstacles for EU citizens when they are moving to another Member State. They should not lose their social security entitlements only due to the movement between the Member States. In this case the Member States are still free to shape the substance of their social security law, including the eligibility conditions for various benefits, the scope (level and duration) of benefits, which might be distinctive for women and men.

Therefore, from the gender equality perspective, the EU legal instruments obliging the Member States to progressively implement the principle of equal treatment of women and men in social protection are even more important. They provide a standard harmonisation of national social security systems (where deviations for the better or worse are as a rule not allowed). There is no migration criterion. Persons do not have to move between the Member States in order to be entitled to equal treatment in social protection.

1.3. Historical development

Distinctively from what is commonly believed, social security was initially not developed on the “traditional” family conception. According to such concept, the man should take care of income and the wife should take care of the household, children and charity activities (the three Ks in German, i.e., *Küche, Kinder, Kirche*). Later on the fourth K has been added on top of that, i.e., *Karriere* (her own career).¹⁴

¹² Conversely, the Social Open Method of Coordination, which is a way of not legally binding cooperation between the MS, is referred to as a soft-law mechanism.

¹³ It could be argued that EU social security coordination law is shaped by Regulation 883/2004 on the coordination of social security systems, its implementing Regulation 987/2009, amendments to these regulations, and decisions of the CJEU and the Administrative Commission for the Coordination of Social Security Systems.

¹⁴ H.-J. Reinhard, *Küche, Kinder, Kirche – Karriere? Notwendigkeit von Veränderungen der sozialen Sicherung der Frau in einer sich wandelnden Gesellschaft*, in: B. Baron von Maydell, T. Zielinski (eds.), *Die Sozialordnung in Polen und Deutschland in einem zusammenwachsenden Europa*, Deutsch-Polnischer Verlag, Warschau 1999, p. 429.

At the beginning certain (social) benefits providing income security were targeted at the individual rather than the family (social assistance was the exception). For instance, mutual societies and fraternities based their activities on the principles of mutuality and reciprocity in order to escape social assistance schemes. They were targeted at income replacement rather than protection of family members.¹⁵ One of the problems was that women were predominately engaged in agricultural and domestic work, which has initially not been recognised as labour, and as such not been covered by social protection schemes.¹⁶ Only after the First World War have the mutual societies obtained their pro-family character, first in Belgium and France, and later on in other countries.

This was reflected also in social insurances. In the first (modern) social insurances provisions supporting the “traditional” family conception could not be detected. For instance, in the original text of the German legislative act on the health insurance of workers from 1883 family members are not covered by its personal scope. They could only benefit if so stipulated by the insurance carrier (*Ortskrankenkasse*). In addition, the German law from 1889 (*Gesetz, betreffend die Invaliditäts- und Altersversicherung*) regulated no survivors’ pensions. A “modern” survivors’ insurance was introduced only in the years after the Second World War.¹⁷

Also, the retirement ages at that time were seldom distinctive for women and men. For instance, the retirement age in Germany was set at 70 years of age and was the same for men and women. The risk of old-age was the presumption of incapacity, since the average life expectancy was 58 years of age and the average time of drawing the old-age pension was two years. Today the retirement age is a reflection of an agreement in the society on the age from which onward it is no longer expected from a person to be (economically) active.¹⁸ However, in some countries, the retirement ages were set distinctively for women and men rather soon, e.g., in Belgium already in 1925 (65 for men and 60 for women).¹⁹

¹⁵ Only few schemes, established by employers and civil initiatives, provided benefits also to family members. Women could become members in special “Frauenkassen” and children in “Kinderkassen”. J. van Langendonck, *Die Hinterbliebenenrenten und das Problem der abgeleiteten Rechte*, in: B. Baron von Maydell, T. Zielinski (eds.), *Die Sozialordnung in Polen und Deutschland in einem zusammenwachsenden Europa*, Deutsch-Polnischer Verlag, Warschau 1999, p. 327ff.

¹⁶ E.g., farm and domestic workers were left out from the 1935 Social Security Act in the US, affecting women (and African Americans) more. L. DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, *Social Security Bulletin*, No. 4/2010, p. 49. France was among the first countries which have established a separate social security scheme for agricultural workers (domestic workers were included in the general scheme, with some modifications). W. J. Cohen, *Foreign Experience in Social Insurance Contributions for Agricultural and Domestic Workers*, *Social Security Bulletin*, February 1945, p. 7.

¹⁷ J. van Langendonck, *op. cit.*, p. 330.

¹⁸ The EU has promulgated the year 2012 as European Year for Active Aging and Solidarity between Generations (<http://europa.eu/ey2012/>).

¹⁹ U. Becker, *Alterssicherung im internationalen Vergleich*, in: U. Becker, F.-X. Kaufmann, B. Baron von Maydell, W. Schmäl, H. F. Zacher (Eds.), *Alterssicherung in Deutschland*, Nomos, Baden-Baden 2007, p. 578.

Protection of the family was facilitated due to the pro-fertility and pro-family tendencies in some countries between the two World Wars. The roots of the “traditional” family model can be found in that period. They were based on three assumptions, i.e., full employment, family responsibility of the insured worker, and a typical male industrial worker in a stable, full-time job at the same employer (male breadwinner model).²⁰ For various reasons the pensionable age for women was reduced. As reasons are mentioned: the distinctive role of women in society (where positive measures are required in order to provide substantive equality),²¹ biological distinctions (on average women could not be burdened with physical work to the same extent as men),²² and even different age at marriage (distinct retirement age should enable common living also after the retirement).²³ All the measures should also be seen from the perspective of higher participation of women in the labour market. Lower retirement ages should enable them to receive their own pensions, rather than being entitled to a derived pension from a husband.

The consequence of the assumed male breadwinner model is that married women; non-employed women (in the employment based social security system); and fixed-term, part-time employed or self-employed women were (and sometimes still are) treated differently from men in matters of social protection. This poses problems, since social relations change and the male breadwinner model is no longer the prevailing one. In many countries we encounter a two-earner model (e.g., in DK, FR) or a one-full-one-part-time-earner model (like in DE and UK).²⁴ More equality and less distinctions (unless objectively justified) between women and men are being promoted. As an emanation of the rule of law principle, a cornerstone of every modern society, it is the duty of the legislator to follow such changes with normative action. However, the legislator is not only following the changes, but is at the same time facilitating the change (in division of roles and behaviour among genders).

1.4. Methodology and structure of the report

This MISSOC Analysis report is based in particular on information contained in the MISSOC Tables and Guides. Other sources include relevant literature and academic studies, reports and selected key policy documents of international organisations.

Predominately, the comparative method of legal research was applied, both in horizontal (i.e., between the MISSOC countries) and vertical manner (national rules in the light of EU law).

²⁰ See also J. Berghman, *Basic Concepts on Social Security in Europe, Social Security Policy and Economics*, KU Leuven, 1999-2000, p. 20.

²¹ E.g. in Germany, and Hungary (in the law of 1951 the retirement ages were set at 60 and 55 years for men and women respectively). U. Becker, *op. cit.*, p. 578.

²² E.g. in Switzerland (at the revision of the AHV in 1954), also in Belgium and (much later) in the discussion of pension reform in Poland (in 1988). *Ibid.*

²³ E.g. in the UK and Portugal, where the retirement age for women was reduced from 65 to 62 in 1973.

²⁴ E. M. Hohnerlein, E. Blenk-Knocke: *Einführung*, in: Bundesministerium für Familie, Senioren, Frauen und Jugend, *Forschungsreihe Band 8, Rollenleitbilder und -realitäten in Europa: Rechtliche, ökonomische und kulturelle Dimensionen*. Nomos, Baden-Baden 2008, p. 13.

Additionally, historical method was used for highlighting the reasons for gender differences and exploring the developments in social protection legislation in MISSOC countries over time. This might be useful for finding the most appropriate normative solutions *de lege ferenda*. Logical, grammatical and teleological methods of legal interpretation were applied as well. Conclusions are drawn from the descriptive-analytical method of the research. For all the details of the social protection systems in the respective MISSOC countries, MISSOC tables should be consulted directly.

The present report is structured around five points, which reflect the consecutive research phases. Under point two the notions of discrimination and gender, including distinctive features of differences and equality, are briefly discussed. The third part of the report presents the most important legal instruments of the EU, the Council of Europe and the ILO, which may have influence on gender equality in social protection. The fourth part presents the core of the report, where gender differences in social protection systems of the MISSOC countries are explored in a more detailed manner. The last part summarises the main conclusions of the analysis.

2. On discrimination and gender

2.1. Defining discrimination

The notion of discrimination is rather neutral in its initial meaning.²⁵ It stands for distinguishing or the process of creating distinctions between two or more subjects (or objects). In this sense, gender differences and gender discrimination could be perceived without distinction.

However, the process of establishing and making divisions between various phenomena is inevitably accompanied by the process of human evaluation. This has “tainted” the notion of discrimination, which is perceived with a negative connotation and used as such also in law. When defining discrimination, words like “less favourable treatment” or “particular disadvantage” are being used in legal texts.²⁶ Hence, it is argued that gender differences in social protection could be justified and even desired to reach the goal of substantive equality in the society (see also under point 2.3. below). On the other hand, gender discrimination as a not justified and socially undesirable distinction between the sexes as legal subjects is as a rule prohibited.

²⁵ Latin *discriminatio* from *discrimen*, *discriminis* – separation, division.

²⁶ See newer EU equal treatment directives, e.g. Art. 2. of Directive 2006/54/EC.

2.2. Defining gender

It is argued that *sex* refers to the biological and physiological characteristics that define women and men, whereas *gender* refers to the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for women and men.²⁷

In certain circumstances people undergo sex changes, which might also be an interesting legal issue, especially when a distinction between women and men is made in social protection schemes. An example is the *Richards* case.²⁸ Richards, who was born a man, underwent gender reassignment surgery. At the time women received their state pension in the UK at the age of 60 and men at the age of 65 years. When Richards applied for a State pension at the age of 60 years, she was refused, with an explanation stating that legally she was recognised as a man and therefore not eligible for a State pension until the age of 65 years.

The CJEU stressed that Directive 79/7/EEC is the embodiment of the principle of equal treatment of men and women in the field of social security which is one of the fundamental principles of Union law. The right not to be discriminated against on grounds of sex is one of the fundamental human rights. In the case *Richards* it held that there was unequal treatment on the grounds of her gender reassignment, and as a consequence this was regarded as discrimination contrary to Article 4(1) of Directive 79/7/EEC. The CJEU also remembered the arguments from the case *K.B. v. NHS Pensions Agency*,²⁹ which concerned the refusal of an occupational widower's pension to K.B.'s transsexual partner.

2.3. Distinctive features of differences and equality

Certain differences between women and men can be *objectively justified*. For instance, only women have the ability to give birth. Hence, special health services and maternity protection in the period immediately before, during and after giving birth are objectively justified. Many States recognise also special protection of fathers. Directive 79/7/EEC explicitly excludes maternity benefits from its material scope of application.

If distinction between women and men is made in social protection systems, the question arises, who is considered to be the *reference group* and who the *protected group*? Rules on non-discrimination are always based on a comparison between the two groups. For instance, if the reference legal norm would be the one stipulating lower pensionable age for women (who would be the reference group), then men, who would have to retire at a higher age, would be treated less favourably. Since there is hardly any objective justification, discrimination against men would exist. But, if we take men as a reference group, women (who can retire at a lower pensionable age)

²⁷ See <http://www.who.int/gender/whatisgender/en/> (august 2012).

²⁸ Case C-423/04 *Richards v. Secretary of State for Work and Pensions* [2006] ECR I-3585.

²⁹ Case C-117/01 *K.B. v. NHS Pensions Agency* [2004] ECR I-541.

are treated more favourably. If this could be justified, then there is no discrimination against men, but more favourable treatment of women. This is referred to as *positive action*.³⁰

Positive action or *positive measures* (rather than positive discrimination)³¹ are an option for the Member States. There is never a duty under the Union law for the Member States to take positive action. The CJEU case law on positive action is underlined by the principle of proportionality. Special measures in favour of one sex have to serve a lawful purpose, be appropriate and necessary for the attainment of the goal, and must not go beyond what is necessary to attain it.³²

Positive action is required to achieve not only *legal* or *formal equality* (forbidding any form of discrimination in order to achieve equal treatment), but also to achieve *substantive equality* between women and men in the society. The latter recognises that for the individuals to receive equal treatment in practice, they must often receive different or unequal treatment in law. Also, the *Treaty on the Functioning of the EU* (TFEU) tries to achieve “full equality in practice between men and women”.³³ EU law on gender equality covers both formal and substantive equality. The latter authorises only such deviations from formal equality as are justified by the end which they seek to achieve, which is securing actual equality.³⁴

Formal equality is achieved mainly by prohibiting direct sex discrimination, while substantive or actual equality is achieved not only by positive action but also by the ban of indirect discrimination. The most common distinction made is indeed the one between *direct* and *indirect discrimination*. Directive 79/7/EEC prohibits both forms of discrimination, although it does not define them. The definition is contained in other non-discrimination directives.³⁵ Direct discrimination 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. Hence, it is discrimination contained already in legal rules (*de iure*).

Indirect discrimination occurs 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. There is no discrimination if such provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Also, the CJEU has

³⁰ See also A. Christensen, Structural Aspects of Anti-Discrimination Legislation and Processes of Normative Change, in: A. Numhauser – Henning (Ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, The Hague 2001, p. 32.

³¹ It has been argued above that discrimination has a negative connotation also in law. Positive discrimination would be *contradictio in adiecto* (a contradiction in itself).

³² R. Nielsen, Is European Union equality law capable of addressing multiple and intersectional discrimination yet? Precautions against neglecting intersectional issues, in: D. Schiek, V. Chege (Eds.), *European Union Non-Discrimination Law, Comparative perspectives on multidimensional equality law*, Routledge-Cavendish, London-New York 2009, p. 45.

³³ Article 157 TFEU.

³⁴ On substantive equality, Advocate General Tesaurò in the case C-450/03 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051. R Nielsen, op. cit., p. 46.

³⁵ See Article 2 of Directive 2006/54/EC and Article 3 of Directive 2010/41/EU.

consistently held that Article 4(1) of Directive 79/7/EEC precludes the application of a national measure, which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex.³⁶

Problems concerning indirect gender differences arise from linking employment and social security. When social security is employment-related, it mirrors gender differences rooted in gender specific employment relations. Whereas in the social security law as such there are less direct *de iure* inequalities between women and men.³⁷

Positive action and substantive equality present *one-way prohibitions* against discrimination. The latter declares that the protected group must not be subject to worse treatment than the reference group. However, it is perfectly legal to treat the protected group better. *Two-way prohibition* of discrimination supports formal equality. In a male-dominated area equal treatment amounts to giving women the right to be treated the same as men and vice-versa. It is a kind of standard harmonisation.

There is a trend towards two-way prohibition of sex discrimination. It is the equal treatment per se, not the desire to improve the situation of the disadvantaged group, that forms the highest value (hence the resistance toward positive action). In social protection this means that women lose certain benefits reserved for the female sex, such as widow's pension and a lower retirement age (not that retirement age for men would be lowered).³⁸

3. International and European regulatory framework

3.1. EU legal instruments

In the EU, gender (next to nationality) was the only equality issue on the legal agenda from the outset in 1958. Today, both the *Treaty establishing the EU* (TEU) and the TFEU³⁹ prohibit gender differences as a matter of principle.⁴⁰ Its development served a dual purpose. Firstly, it served an economic purpose in that it helped to eliminate competitive distortions in a common market.⁴¹

³⁶ Case C-343/92 *De Weerd, née Roks and Others* [1994] ECR I-571.

³⁷ U. Becker, Prohibition of discrimination in Social Security Law, *Pravnik* No. 3-4/2012, p. 236. Extensively on Indirect discrimination C. Tobler, *Indirect Discrimination, A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Intersentia, Antwerpen – Oxford 2005.

³⁸ A. Christensen, *op. cit.*, p. 37.

³⁹ Both published in OJ C 115, 9. 5. 2008.

⁴⁰ Equality between women and men is among the values of the EU (Article 2 TEU), which should be promoted (Art. 3 TEU and Article 8 TFEU). It should combat discrimination based on sex (Articles 10 and 19 TFEU) also in the area of social policy (Article 157 TFEU).

⁴¹ Three of the EEC founding States have ratified the ILO Equal remuneration Convention (No. 100) and three have not. The latter could pay women less than men and gain (undesired) competitive advantage.

Secondly, on a political level, it provided the EU with a facet aimed toward social progress and the improvement of living and working conditions.⁴² Protection against discrimination on the grounds of sex has remained a fundamental function of the EU.

The acceptance of the social and economic importance of ensuring equality of treatment is reflected in the *Charter of Fundamental Rights of the EU*, which has become a legally binding document.⁴³ It contains a chapter on equality, where gender differences are prohibited under two articles. First, it is the case in the general anti-discrimination provision (Article 21), where the negative aspect is stressed, i.e., any discrimination based on sex is prohibited. Second, the special provision of Article 23 is emphasising a positive aspect, i.e., ensuring equality between women and men and advocating positive measures providing specific advantages in favour of the under-represented sex. Both provisions are general enough to cover also gender differences in social protection, since social security and social assistance entitlements are protected by Article 34 of the Charter. Equality between women and men is also emphasised in the European Commission's *2011 Report on the Application of the EU Charter of Fundamental Rights*.⁴⁴

More direct legal influence is provided by the non-discrimination directives. Many of them have been updated, like Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (repealing among others Directive 86/378/EEC) and Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity (repealing Council Directive 86/613/EEC).⁴⁵ The only directive still in force from the initial "package" is *Directive 79/7/EEC* on the progressive implementation of the principle of equal treatment for men and women in matters of social security.⁴⁶ This is no coincidence, since the Member States are still rather reluctant to transfer their competencies in the realm of social protection to the EU. In order to be adopted, Directive 79/7/EEC had to be limited in scope. It provides for exceptions leaving a broad margin of discretion to the Member States regarding the factors which can justify distinctive treatment based on gender.

The material scope of the Directive is limited. It applies to the majority of traditional social risks, excluding not only newer risks (like reliance on long-term care), but also survivors' and family benefits (except the latter are granted by way of increases of benefits due in respect of the risks covered), and social assistance. Only the so called special non-contributory cash benefits⁴⁷ or categorical social assistance is covered, i.e., if social assistance supplements or replaces the schemes covered by the Directive. Because women rely on these benefits more often (e.g., benefits

⁴² Handbook on European non-discrimination law, European Union Agency for Fundamental Rights, European Court of Human Rights – Council of Europe, 2010, p. 90.

⁴³ See Article 6 of the TEU.

⁴⁴ C.f. point 2.2. of the Report, COM(2012) 169 final, Brussels, 16. 4. 2012.

⁴⁵ OJ L 180, 10. 01. 1979.

⁴⁶ OJ L 6, 15. 7. 2010.

⁴⁷ See Art. 70 of the Regulation 883/2004.

for the carer, survivors and family benefits, and social assistance) than men, these gaps in the material scope of Directive 79/7/EEC can be a source of potential gender differences.⁴⁸

Inactive persons, with no connection to the labour market are excluded from the personal scope of Directive 79/7/EEC. It applies to workers and self-employed persons whose activity is interrupted or terminated by occurrence of the social risk. There are risks of gender differences that disadvantage inactive persons (which might affect women to a larger extent than man).⁴⁹

Directive 79/7/EEC provides for numerous exceptions, most notably in the pension and invalidity schemes (among them distinctive pensionable ages). Provisions distinguishing between women and men are admissible only if they are necessary and objectively linked to the exception provided by the Directive.⁵⁰

Women are more likely than men to work part-time⁵¹ and have low earnings and shorter careers due to care responsibilities (for children, elderly and disabled family members), which might lead to limited access to benefits and their lower amounts. The CJEU is leaving a *broad margin of discretion* to the Member States. This is expressed, for example, by allowing the calculation of *pro rata temporis* pensions in the case of part-time employment.⁵² The CJEU has ruled many schemes to be compatible with Directive 79/7/EEC, which sets rules that, because they take into account the career pattern, are, in practice, easier for men to fulfil than women.⁵³

Although Directive 79/7/EEC cannot provide for certain benefits or their certain level (which remains in the competence of the Member States), it played a major role in abolishing direct, and to a certain extent indirect, gender differences in social protection schemes across the Union. Exceptions provided in Article 7(1) of the Directive have to be construed narrowly and Member States have to periodically examine matters excluded in order to ascertain, in the light of social developments, whether there is justification for maintaining such exceptions.

3.2. Council of Europe legal instruments

⁴⁸ J.-Ph. Lhernould et al., Study of the gender dimension and discrimination in social protection, WYG International, August 2010, p. IV.

⁴⁹ Ibid.

⁵⁰ More restrictive interpretation in the Case C-104/98 *Buchner* [2000] ECR I-3625 (early payment of an old-age pension due to incapacity for work not compatible with Art. 7 of Directive 79/7/EEC).

⁵¹ The CJEU has developed a methodology of comparison between full-time and part-time workers in order to assess the existence of an indirect discrimination. In the case C - 300/06 *Voß v Land Berlin* [2007] ECR I-10573 (§41-42) the CJEU argued that “the best approach to the comparison of statistics is to consider, on the one hand, the proportion of men in the workforce affected by the difference in treatment and, on the other, the proportion of women in the workforce who are so affected. If the statistics available indicate that, of the workforce, the percentage of part-time workers who are women is considerably higher than the percentage of part-time workers who are men, it will be necessary to hold that such a situation is evidence of apparent sex discrimination, unless the legislation at issue in the main proceedings is justified by objective factors wholly unrelated to any discrimination based on sex.”

⁵² Case C - 4/02 *Schönheit* [2003] ECR I-12575.

⁵³ More J.-Ph. Lhernould et al., p. 13.

The *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)* contains a non-discrimination article (Article 14). The enjoyment of the rights and freedoms enshrined in the ECHR has to be secured without discrimination on the grounds of sex. Protocol No. 12 to the ECHR introduced (in its Article 1) a general non-discrimination clause, prohibiting also sex discrimination in the enjoyment of any right set forth by law or discrimination by any public authority.

Although the ECHR does not entail social and economic rights, social protection schemes have been tackled especially in conjunction with Article 6 (right to a fair trial) and Article 1 of Protocol 1 to the ECHR (protection of property).⁵⁴

A series of cases relating to differences in treatment on the basis of sex in relation to retirement age show that the European Court of Human Rights (ECtHR), similarly as the CJEU, affords the States a wide margin of appreciation in matters of fiscal and social policy. For instance, in the case of *Stec and Others v. UK*⁵⁵ the applicants complained that as a result of different retirement ages for men and women they had each been disadvantaged by the alteration of benefits payable to them, which had been determined according to pensionable age.

The ECtHR found that in principle sex discrimination could only be justified where *very weighty reasons*⁵⁶ existed. However, a wide margin is usually granted to the States under the ECHR when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than an international judge to appreciate what is in the public's interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is clearly without reasonable foundation.

The ECtHR found that at their origin the different pensionable ages were actually a form of *special measures*, in that they were designed to offset the financial difficulties that women might suffer by reason of their traditional role in the home, which left them without independent monetary income. It was found that the government had begun to gradually make adjustments in order to equalise the pensionable ages of men and women, and that it had not acted beyond its margin of appreciation either in choosing to do this over a number of years or in failing to implement changes sooner.⁵⁷ The ECtHR established no violation of Article 14 ECHR taken in conjunction with Article 1 of Protocol No. 1.

⁵⁴ K. Kapuy, D. Pieters, V. Zaglmayer (Eds.) *Social Security Cases in Europe: The European Court of Human Rights*, Intersentia, Antwerp 2007.

⁵⁵ ECtHR, *Stec and Others v. UK* [GC] (Appl. Nos. 65731/01 and 65900/01), 12 April 2006.

⁵⁶ *Ibid.*

⁵⁷ Handbook on European non-discrimination law, op. cit., p. 95.

Social rights are enshrined in the *European Social Charter* – ESC (the initial and the revised one). The minimum standard for the right to social security (Article 12), according to the ESC, is the minimum necessary for ratification of the ILO Convention No. 102 (for the initial ESC), and of the European Code of Social Security (for the revised ESC). Both are based on the traditional breadwinner model, since the standard beneficiary is a man with wife and two children. The revised Charter is more gender neutral in this respect, since the standard beneficiary is a person with spouse and two children. However, only one State has ratified it so far⁵⁸ and it has not yet entered into force.

The right to social and medical assistance (Article 13 of both ESC versions) is *de iure* gender neutral. Any person (woman or man) without adequate resources has to be granted adequate assistance and care necessitated by her or his condition. Although both ESC versions mention only “his own efforts” and “his condition”, the provision has to be read in conjunction with the preamble of the initial ESC and Article E of Part V of the revised ESC.

According to these provisions, the enjoyment of the rights set forth in the ESC has to be secured without discrimination on any ground, including sex. This includes the rights to social security and to social and medical assistance, which are core rights of the ESC. The European Committee of Social Rights (ECSR) stressed that Article E has to be interpreted by the analogy with Article 14 ECHR. It does not present a right per se, but has to be applied in conjunction with one of the rights enumerated in the ESC. It prohibits not only direct, but also indirect discrimination.⁵⁹

According to the appendix of the revised ESC, a differential treatment based on an objective and reasonable justification is not deemed discriminatory. In this respect maternity benefits are mentioned in Article 8 (the right of employed women to protection of maternity). This Article obliges the States Parties to ensure employed women a period of leave before and after childbirth (up to a total of at least fourteen weeks) either by paid leave, by adequate social security benefits or through benefits from public funds. The ECSR emphasises the particular position of women with respect to maternity, who should enjoy *effective protection* in this period. Social security benefits must be adequate, and must not be such as to compel women to continue working during pregnancy. The Committee pays particular attention to two elements which may determine whether or not benefits are adequate, i.e., a social security ceiling (which directly affects the amount received) and criteria for the award of benefits (especially the length of affiliation to a social security scheme).⁶⁰

⁵⁸ It was the Netherlands in 2009, <http://conventions.coe.int> (August 2012).

⁵⁹ P. Končar, Mednarodna ureditev prepovedi diskriminacije s poudarkom na Evropski socialni listini (International prohibition of discrimination with emphasis on the European Social Charter), in: Delavci in delodajalci 2007 – special edition, p. 34.

⁶⁰ Equality between woman and men in the European Social Charter, Human rights, Social Charter monographs – No.2, Council of Europe, Strasbourg, 1999, p. 61 ff.

In addition, Article 16 of the initial and revised ESC (on the right of the family to social, legal and economic protection) provides protection, particularly for women who are not covered by Article 8 and/or who are not covered by any social security scheme providing the necessary financial assistance during a reasonable period before and after confinement, as well as adequate medical care during confinement.⁶¹

Article 20 of the revised ESC⁶² ensures the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. According to its Appendix, social security matters, as well as other provisions relating to unemployment benefit, old-age benefit and survivor's benefit, may be excluded from the scope of this article. Nevertheless, the ECSR may take a broader view, including not only occupational,⁶³ but also social security schemes.⁶⁴

3.3. ILO legal instruments

The post Second World War social security systems were tuned to the industrial society that had matured by then. National legal solutions of that time are mirrored in the international legal instruments adopted after the War. A good example is the ILO Convention No. 102 concerning minimum standards of social security from 1952, which has been ratified by the majority of MISSOC countries.⁶⁵ Although open in its personal scope (coverage should extend to a certain part of economically active persons or residents),⁶⁶ it defines a standard beneficiary as a man with a wife and two children, and foresees only widow's pension (which should suffice for a widow and two children).⁶⁷

The importance of Convention No. 102 (and some others) is still advocated. It is argued, that from a gender perspective some ILO social security conventions contain references to the male breadwinner model. This has sometimes been an obstacle to ratification, showing a certain degree

⁶¹ C.f. Explanatory report to the revised ESC.

⁶² C.f. also Article 1 of the 1988 Additional Protocol to the initial ESC.

⁶³ E.g. noticing for Cyprus in the 2008 reporting cycle that "Law 133 of 2002 on equal treatment between men and women in occupational social security schemes guarantees equal treatment in this area."

⁶⁴ E.g., in the 2008 reporting cycle the ECSR found that the "situation in Sweden is not in conformity with Article 20 of the Revised Charter on the ground that the employment insurance legislation indirectly discriminates against women working part-time." It noticed for Belgium that "According to the report there is no discrimination on grounds of sex in social security." For Finland the ECSR stressed that it has previously asked for information on how gender equality is guaranteed in the social security system. It concluded that "From the information provided in the report it appears that in access to health care and unemployment benefits there is no discrimination on grounds of gender and measures have been taken to ensure equality in access to family benefits and within the pension system. The pensionable age of women will gradually be aligned with that of men throughout a transition period which ends in 2015." More examples (e.g., also for PT and NL) at <http://hudoc.esc.coe.int/> (August 2012).

⁶⁵ C.f. www.ilo.org, August 2012.

⁶⁶ This was the result of residence-based schemes, e.g. NHS in the UK, introduced in 1946 on the grounds of the Report of sir William Beveridge, Social Insurance and Allied Services, HMSO, London 1942. Some argue, that the "Beveridge model" is based on an individual rather than the family. However, clustering the countries is inevitably generalising and imperfect from a legal point of view.

⁶⁷ C.f. Article 67 of the Convention 102.

of misunderstanding of the conventions. While the language used in the conventions may not correspond to today's realities, the wage levels of men in most countries and sectors are still higher than those of women. Thus, the earnings of the male breadwinner still constitute a relevant reference for calculating benefits under the conventions, while providing protected women with higher levels of benefits than if their own earnings were taken into account.⁶⁸

Ratification of the ILO Convention No. 102 (and others) is promoted, since it sets minimum requirements for a comprehensive social security system. This is important in the context of the *Global Campaign on Social Security and Coverage for All*, launched by the ILO in 2003. Extending social protection is one of the pillars of the ILO *Decent Work Agenda*. The Global Campaign has a gender dimension in that women are more often among those not covered by any social security provisions. Hence, social protection should be extended to all women and men.⁶⁹ To achieve this goal, the United Nations System Chief Executives Board for Coordination (UNCEB) adopted the *Social Protection Floor Initiative* in April 2009 as one of the nine UN joint initiatives to cope with the effects of the economic crisis.⁷⁰

This initiative resulted in a new international labour standard adopted by the International Labour Conference very recently. It is the *Recommendation No. 202 concerning national floors of social protection*, referred to as Social Protection Floors Recommendation, 2012 (No. 202). It is recognised that social security is an important tool to promote gender equality. Member States are called upon to apply the principles of non-discrimination, gender equality and responsiveness to special needs.⁷¹ In monitoring their progress, the States should regularly collect, compile, analyse and publish an appropriate range of social security data, statistics and indicators; disaggregated, in particular, by gender. The text was adopted in form of a (legally not binding) recommendation, which is easier to agree upon than a convention.

4. Gender differences in social protection systems of the MISSOC countries

4.1. Differences lying in the nature of a specific sex

4.1.1. Health care

Women and men are by nature distinctive, which requires distinctive treatment in social protection systems of the MISSOC countries. All of them provide specific medical benefits to women in the

⁶⁸ Gender equality at the heart of decent work, International Labour Conference, Report VI, ILO, Geneva 2009, p. 131.

⁶⁹ Ibid., p. 153.

⁷⁰ This initiative is co-led by the ILO and the World Health Organization and involves a group of 17 collaborating agencies, including United Nations agencies and international financial institutions.

⁷¹ Chapter I, point 3 (d) of the Recommendation No. 202.

period before, during and after confinement. These are provided either by the mandatory health insurance (providing benefits in kind or refunding costs of healthcare), by a national health service or by the State directly.

Some countries insure pregnant women from the moment pregnancy is medically determined, even if there are no other grounds for mandatory health insurance (EE). In some other countries the State pays benefits on their behalf (LT for pregnant women on maternity leave, LV for the spouses of Latvian citizens and permanent residents).

In many countries where *patient's charges* are required for health services, services related to pregnancy and childbirth are exempt from such copayments regime. For instance, in Latvia no copayment is required for pregnant women and women in the period following childbirth up to 42 days. In Slovenia there are no copayments for health care of women, including family planning advice, contraception, pregnancy and childbirth. In Estonia they are not required for pregnant women (from the moment pregnancy is medically determined) for services (and home visits) of a (specialised) physician. Exempted from charges are pregnant women with no income (PT) or who have just given birth (RO), or for dispensary care (CZ), or when receiving services in respect of motherhood (IE).

In some countries *dental treatment* is fully covered for pregnant women (RO, HU - from established pregnancy until 90 days after the birth, except, e.g., dental prosthesis, UK - pregnant, women and those who have had a baby in the preceding 12 months), or they receive more benefits (EE). Also, *pharmaceuticals* might be provided to pregnant women or fresh mothers free of charge (UK, RO, SI).

Special preventive treatment might be provided to pregnant women, e.g., screening tests for the detection for chromosomal abnormalities (e.g., CY), or all women for diseases prevailing to them (SI), e.g., screening for certain forms of cancer, like breast cancer (CY - for women 50-69 years of age) or cancer of the womb neck (cervix uteri – in LV one test per three years for women aged 25-70). Distinctive special preventive treatment may also apply for men (for certain diseases).

4.1.2. Maternity and paternity benefits

Distinctive treatment of women is justified not only by providing specific health services, but also by providing *maternity benefits*. Usually the entire female population is covered by some kind of maternity protection scheme.

Employed and other economically active women are entitled to benefits from social (usually sickness or maternity) insurance, which may be mandatory (like in AT, BE, CZ, CY, EE, FR, DE, EL, IE, IT, LV, LI, LU, PL, RO, SK, SI, ES, NL). In addition, there is voluntary insurance for certain groups, like self-employed persons (LT), working pensioners (BG), posted women (CY -

women working abroad in the service of Cypriot employers), or all above a certain age (SK - all persons over 16 years). It is also possible, that women may derive their insurance from their husbands (CY, DE - spouses and daughters, PL, ES). Residence-based schemes provide maternity benefits in many countries (FI, DK - universal scheme for active population, MT, NO, SE - parental insurance covering all residents, similar in UK).

Social insurance			Residence-based schemes
mandatory	voluntary (for various groups)	derived rights	
AT, BE, CZ, CY, EE, FR, DE, EL, IE, IT, LV, LI, LU, PL, RO, SK, SI, ES, NL	LT, BG, CY, SK	CY, DE, PL, ES	FI, DK, MT, NO, SE, UK

Table 1: Examples of social insurance- and residence-based maternity protection schemes

There might be distinctions within the group of women itself. Many schemes require a certain insurance (or residence) period to open the access to maternity benefit, which might be to the detriment of those women who have just started being active or who had interruptions in their careers (several, non-consecutive, fixed term contracts). Therefore, some countries require certain insurance records in a longer time-period (e.g., CZ - 270 days) or do not require insurance periods at all, as working directly before confinement suffices (EE, IT, LV, PL, SI, NL).

Non-active mothers and students can be eligible for special benefits in the form of maternity or birth grants (IS, HU, NO), maternity allowance (UK - those not entitled to statutory maternity pay, CY - special maternity grant, LI, LU, BG), or parental allowance (SI - in the initial period resembling maternity benefit). Although being maternity benefits, they are sometimes mentioned under family benefits (see also point 5.6., below).

Maternity benefits may only under certain circumstances be used by other persons (a father), and only to the extent they have not been used by the pregnant woman/mother (hence never in the period before confinement). The first country to introduce separate *parental benefits* (paid parental leave) also to fathers was Sweden in 1974. This scheme has been continuously reformed in order to bring a more equal parenthood (expansion in terms of duration and fathers eligibility). It is argued, that this is one of the explanations why Sweden has been able to combine high fertility rates with high female labour participation and low child poverty.⁷² A woman could be less hesitant to have a second, or even a subsequent child, if the father is also active in the upbringing of children.

⁷² A.-Z. Duvander, T. Ferrarini, S. Thalberg, Swedish parental leave and gender equality, Achievements and reform challenges in a European perspective, Institute for future studies 2005, p. 2.

Many countries have followed this example. Reconciliation (of family and work) policies (in a dual earner model) are paying more attention to the question of men's involvement in providing care. The main intervention targeting fathers is through the design of statutory parental leave schemes. Paternity leave with certain (sometimes limited) paternity benefits/grants/allowances (in some countries to a certain extent paid by the employer) has also been introduced in other countries (e.g., BE, FI, FR, IS, LV, LT, ES, SI and UK).

This is reflected furthermore in the *New Directive on Parental Leave* (Directive 2010/18/EU).⁷³ One of its objectives is to improve the equality between men and women. An important development is the extension of (non-transferable) parental leave quotas for each parent.

Directive 2010/18/EU entitles male and female workers to an individual right to parental leave on the grounds of the birth or adoption of a child, to take care of that child until a given age (up to eight years), as defined by Member States and/or social partners. It has to be granted for at least four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. All matters regarding social security are for consideration and determination by Member States and/or social partners, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care. Hence, unless Member States supplement the Directive's requirements with suitable financial compensation for the leave period, fathers' take-up of parental leave is likely to remain low.⁷⁴

The non-availability of parental leave for fathers has been challenged also before the ECtHR. The first case was *Petrovic v. Austria*.⁷⁵ The government justified this different treatment by the 'fact' that at the time in question mothers had the primary role in looking after children. Noting the woman's primary role in the upbringing of children and the lack of a common approach among the States on the issues at the time in question, the Court held that the States did not exceed their margin of appreciation.

The ECtHR changed its approach in the case decided in 2012, i.e., *Markin v. Russia*,⁷⁶ which concerned the non-availability of parental leave for male military personnel. It pointed to the evolution of society towards a more equal sharing between women and men of the responsibility for the upbringing of children. The ECtHR concluded that the traditional distribution of gender

⁷³ Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, UL L 68, 18. 3. 2010. The Directive had to be implemented by 8 March 2012 (with maximum additional period of one year).

⁷⁴ Men and gender equality - Tackling gender segregated family roles and social care jobs, European Commission Analysis note, March 2010.

⁷⁵ *Petrovic v Austria*, Appl. no 20458/92, 27. 3. 1998.

⁷⁶ *Markin v Russia* [GC], Appl. no. 30078/06, 22. 3. 2012.

roles could not justify the exclusion of men from an entitlement to parental leave.⁷⁷ It mentioned that the decision of the CJEU in case *Roca Álvarez*,⁷⁸ where the Court established that a national measure, which provides that female workers who are mothers are entitled to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave (unless the child's mother is also an employed person), is contrary to the EU (non-discrimination) law.

4.2. Sickness cash benefit

Sickness cash benefit is *de iure* provided to women and men without any distinction. In many countries (like BE, BG, CY, DK, EE, FR, DE, EL, IS, IE, LI, LT, LU - only in case of termination of employment contract, MT, PL, PT, RO, SK - only for self-employed and voluntarily insured persons, ES, CH, UK) the eligibility condition is a certain insurance/employment period (as a rule six months, but could be less, e.g., four weeks in NO or two days in LI). Such period, especially if it has to be uninterrupted or completed immediately preceding sickness, might be more difficult to complete by part-time workers and workers with a fixed-term contract. It may be easier to complete, if the contribution record can be completed in a certain longer period (like in LT - three months during the last 12 months or at least six months during the last 24 months, or EL - 180 days in five years). Since as a rule it is usually women who perform part-time work (possibly combining with care activities) and fixed-term work, they could be affected more by limited access to a sickness cash benefit than man. In countries where no qualifying period is required (like in AT, CZ, FI, HU, IT, LV, SI, SE, NL), more gender equal access to sickness benefit can be provided.

Many MISSOC countries (e.g., BG, CZ, DK, EE, FI, DE, HU, IS, LT, LU, NO, RO, SI, ES, SE, UK) recognise the right to a sickness cash benefit not only in case the insured person is not capable of working (and loses income), but also if s/he is otherwise prevented from work. This may be the case when nursing a sick child (or other immediate family member). Sickness cash benefit or other financial support for caring for a sick child (under a certain age) is as a rule of limited duration (limited to a certain amount of days per year or per each case, but may be prolonged for single parent families), and may depend on the age or number of children. It may also be limited to certain most serious diseases and excluded if there is a person in the household who could care for the sick child.

Sickness cash benefit is *de iure* provided to one of the parents, either to a father or a mother. However, *de facto*, in many countries in the (overwhelming) majority of cases it is the mother who takes care of a sick child and requires income replacement benefits. As a rule, they do not amount to the actual salary/wage of a mother, but are lower (usually they are paid around 80 to 85 percent

⁷⁷ More in I. Radačić, The European Court of Human Rights' Approach to Sex Discrimination, European Gender Equality Law Review, No. 1/2012, p. 15.

⁷⁸ Case C-104/09 *Roca Álvarez v. Sesa Start España ETT* [2010] ECR I-8661.

of the calculation base, in SK only 55 percent of the assessment base - daily earnings calculated on the basis of the previous year). This may (*indirectly*) affect women more. They will be in a less favourable position with respect to all income replacement benefits calculated on the grounds of (lower) insurance (or other calculation) base, including possibly lower old-age pensions. Such situation does not contribute to more substantive equality between men and women. There would be fewer differences if sickness cash benefit would fully replace the lost income.⁷⁹

	Qualifying period	No qualifying period	Nursing a family member
Sickness cash benefit	BE, BG, CY, DK, EE, FR, DE, EL, IS, IE, LI, LT, LU, MT, NO, PL, PT, RO, SK, ES, CH, UK	AT, CZ, FI, HU, IT, LV, SI, SE, NL	BG, CZ, DK, EE, FI, DE, HU, IS, LT, LU, NO, RO, SI, ES, SE, UK

Table 2: Examples of sickness cash benefits provided with/without qualifying period and for nursing

4.3. Old-age (and invalidity) pensions

The most researched topic related to gender differences in social protection is concerning pension schemes.⁸⁰ For various reasons pension schemes contain many differences between women and men. Some of them are more directly and some of them more indirectly expressed. Among the first are distinctive pensionable ages and child raising periods (both express exceptions of Directive 79/7/EEC). Indirect differences are reflected from the differences in work patterns of women and men. Where pensions are based on the lifetime employment record, they may be less favourable to flexible workers (i.e., not only self-employed persons, but also those working part-time or on a fixed-term contract), which are as a rule women. Based on the traditional breadwinner model, some countries regulate splitting of insurance periods or pension calculation basis.⁸¹

4.3.1. Access to a pension

⁷⁹ For instance, in Estonia the sickness cash benefit is paid at 100 percent of the reference wage for 14 calendar days for nursing a child up to 12 years of age at home (otherwise 80 percent).

⁸⁰ For instance, J-P. Lherould, et al., op.cit. S. Renga, D. Molnar-Hidassy, G. Tisheva, Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries, European Commission 2010. E. Fultz, M. Ruck, S. Steinhilber (Eds.), The gender dimensions of social security reform in Central and Eastern Europe: Case studies of the Czech Republic, Hungary and Poland, ILO 2003.

⁸¹ E.g., in DE, LI (where factors of the „qualifying average annual income“ are split in half between the marital partners (so-called „splitting“) for the duration of the marriage, as soon as both partners are entitled to a pension; additionally, in the case of divorce or if a widow or widower receives an old-age or invalidity pension), similarly in CH.

In order to be entitled to a statutory old-age pension, a person has to reach a certain retirement age and complete a certain employment or insurance period (in insurance based schemes, e.g., in AT, BE, BG, CY, CZ, FR, DE, EE, EL, HU, IR, IT, LV, LI, LT, LU, PL, PT, RO, SK, SI, ES, CH, SE), or residence period (in residence-based schemes, e.g., in DK, FI, IS, NO, NL, UK). For those not meeting these conditions, categorical social assistance,⁸² i.e., guaranteed minimum income for old-aged persons, might be provided (e.g., in BE, BG, EE, PT, ES, SE). There is a new trend in some countries (SE, LV, IT, PL, AT - for those insured after 2004) to introduce non-financially or notional defined contribution (NDC) schemes. They are still repartition schemes, but defined contributions rather than defined benefits schemes. They are based on notional pension accounts and could be affected by the economic crisis as well.⁸³

	Social insurance	Residence-based	Social assistance	NDC schemes
Old-age pension	AT, BE, BG, CY, CZ, FR, DE, EE, EL, HU, IR, IT, LV, LI, LT, LU, PL, PT, RO, SK, SI, ES, CH, SE	DK, FI, IS, NO, NL, UK	BE, BG, EE, PT, ES, SE	SE, LV, IT, PL, AT

Table 3: Examples of various possibilities for providing income security in old age (social protection, i.e., social security and social assistance schemes)

Insurance or residence period

Insurance or residence periods vary to a large extent among the MISSOC countries. Some do not require any insurance period (like BE, NL) some require shorter insurance/residence periods (e.g., 1 year in LI, CH, UK; 3 years in DK, FI, IS, NO; 5 years in DE; 5 or 20 years in IT; 10 years in AT, CY, LV, LU, MT; 15 years in EE, EL, LT, PT, RO, SK, SI, ES) and some longer ones (like PL or CZ-20 in process of prolongation to 35 years and a bit lower for older persons).

Such membership period is in some MISSOC countries *de iure* different for women and men (like in PL 25 years for men and 20 years for women, in SI 40 years for men and 38 years for women, both at age 58). Hence, a reduced contribution period is required for women. In comparison with the reference group of men they are enjoying preferential treatment, which may be combined with lower pensionable age (discussed below).

Access to pension insurance might be limited if longer membership periods are required. They are more difficult to meet if part-time work is reassessed to a full-time equivalent (e.g., a woman has to be employed as a half-time worker for 30 years to count an insurance period of 15 years, which

⁸² Special non-contributory cash benefit in the meaning of Art. 70 of the Regulation 883/2004).

⁸³ P. A. Köhler, Die neue Alterssicherung Schwedens in der globalen Finanzkrise – bedingt krisenfest?, Deutsche Rentenversicherung, 1/2010, p. 102.

is a minimum entitlement condition, e.g., in SI, reportedly similar in IT, PL).⁸⁴ Such condition is even more difficult to satisfy if part-time work is combined with fixed-term work and interruptions in women's careers (for instance for performing care activities).

In addition, women are more likely than men to be outside the labour market at any age, to work part-time or under atypical contracts.⁸⁵ Insurance based schemes might disadvantage them by excluding or limiting access to pension insurance. For instance, reduced activity on a labour market or very low income might not lead to payment of contributions and pension insurance coverage (AT,⁸⁶ DE,⁸⁷ IE,⁸⁸ LU⁸⁹, ES,⁹⁰ SE,⁹¹ UK,⁹² in CY employed persons in the service of their spouse are excluded). Although in some countries they have an option to join the pension scheme voluntarily (e.g., AT, DE), in many cases this option is not taken up because of the costs involved.

The CJEU held that provisions of German law under which employment for remuneration under a certain limit is excluded from the statutory old-age insurance scheme, even if it affects considerably more women than men, is compatible with Directive 79/7/EEC. The reason for the Court was that such provision was necessary in order to achieve a social policy aim unrelated to any discrimination on grounds of sex.⁹³

The increase in women's employment and policies to integrate women into the labour market means that an increasing number of women face indirect differences by exclusion from or limited

⁸⁴ J.-Ph. Lhernould, et al., op. cit., p. 34.

⁸⁵ Progress on equality between women and men in 2011, European Commission, op. cit., p. 7.

⁸⁶ In AT there is no compulsory insurance if the income is below the marginal earnings threshold of €376.20 per month. The income from more than one job is added together.

⁸⁷ In DE employees with earnings up to €400 monthly or a short-term employment (up to 2 months or 50 working days per year), if this employment is not pursued as a profession and if the remuneration does not exceed €400 per month, are excluded from the compulsory statutory old-age scheme. As much as three quarters of them are women. This problem is widespread, given that almost 10 per cent of German employees are working in such minor employment. J.-Ph. Lhernould, et al., op. cit., p. 32.

⁸⁸ Persons with weekly earnings less than €38 and the self-employed with an annual income of less than €3,174 are excluded from pension insurance in IE.

⁸⁹ In LU exemption from compulsory insurance is granted to persons who are only engaged occasionally and not habitually in a professional activity, when the period of activity is determined in advance. The period of activity should not exceed three months in each calendar year. The insurance does not cover non-employed activities if the work income does not exceed one third of the social minimum wage.

⁹⁰ In ES all salaried work considered marginal and not a basic means to earn one's living is excluded.

⁹¹ In SE total annual earnings less than 0.423 Price base amounts, i.e., SEK 18,612 (€2,080), are not pension-carrying in the earnings related old-age pension system.

⁹² In the UK no contributions and no benefits for persons with earnings below the Lower Earnings Limit (LEL) GBP 102 (€122) per week, or for self-employed persons with annual earnings less than GBP 5,315 (€6,368). The Primary Threshold (PT), GBP 139 (€167) per week, is set at the Personal Tax Allowance, at which employees start to pay contributions. As a result, some employees are treated as if they have been paid, allowing them to build up entitlement to contributory benefits such as State Pension.

⁹³ C-317/93 *Nolte* [1995] ECR I-4650.

access to pension insurance. For instance, to avoid such situations, Belgium has equalised half-time work with full-time work in contribution records in 2006.⁹⁴

⁹⁴ J.-Ph. Lhernould, et al., op. cit., p. 34.

Retirement age

It has already been argued above that retirement or pensionable ages⁹⁵ were initially equal for men and women (if there were economically active), but have been differentiated later on (especially after the Second World War). For instance, a decade or two ago⁹⁶, in many MISSOC countries the retirement age was lower for women than it was for men (for standard but also early pension), e.g., by five years, usually 65 men and 60 women (BE, EE, EL - for persons insured before the end of 1992, AT, PT, UK, PL) or 60 men and 55 women (IT, HU, LT, RO – after a certain contribution period, otherwise 62 and 57 years). It was distinctive also in some other countries (like BG, CZ, SI), while in others it was equal (e.g., FR at 60, DE, ES, IE, LU, NL, FI, SE at 65 and DK at 67 years).

Today, in some MISSOC countries pensionable ages are still distinct for men and women (e.g., CY - 65 and 63, PL - 65 and 60, RO - raised to 65 men and 63 women by 2030, CH, SI). In others they have either been equalised (e.g., at 62 in HU, LV, SK; at 64 in LI; at 65 in BE, DK, FI, IR, LU, PT, ES; or at 67 in IS, DE – progressively raised for both sexes), or are in the process of equalisation (progressively raising the age of women). In the latter case equal retirement ages are either already agreed and enacted in a legislative act (e.g., AT to 65 years between the years 2024 and 2033, EE and LT to 65 years by 2026, CZ, MT, EL for persons insured since 1993, UK to 66 by 2020, in Croatia (HR) it should be equalised by the end of 2018 according to the Constitutional Court's decision,⁹⁷ but the period has been prolonged by the legislator to 2030)⁹⁸, or are in lively public debate. For instance, in Slovenia a legislative act introducing pension reform has been rejected in a referendum (in 2011)⁹⁹, and in CH the equalisation was also rejected by a referendum (on 16 May 2004),¹⁰⁰ albeit the distinction of one year (65 for men and 64 for women) is rather small.

	Distinct for women and men	Equal or being equalised
Pensionable ages	CY, PL, RO, CH, SI	HU, LV, SK, LI, BE, DK, FI, IR, LU, PT, ES, IS, DE, AT, EE, LT, CZ, MT, EL, UK, HR

Table 4: Examples of pensionable ages where distinction between women and men remain or is (in the process of being) equalised

⁹⁵ Retirement and pensionable age will be used without distinction, although strictly speaking retirement age is the age when a person stops working, i.e., retires (and starts receiving a pension), and pensionable age is when a person starts receiving a pension, even if s/he might still be economically active.

⁹⁶ MISSOC tables 1993 and 1998. MISCEEC tables 1999, MISSCEO tables of the Council of Europe, 2000.

⁹⁷ Decision No. U-I-1152/2000, U-I-1814/2001, U-I-1478/2004, U-I-3137/2004, U-I-3760/2005, 18 4. 2007.

⁹⁸ In 2010 the Croatian Pension Insurance Act (published in OJ 121/10) has been amended and the retirement age for women is raised by three months per year between 2010 and 2030.

⁹⁹ G. Strban, Slovénie, Après avoir été rejetée lors d'un référendum, la réforme des retraites reste à faire, Liaisons sociales Europe, No. 291/2011, p. 2-3.

¹⁰⁰ U. Becker, op. cit. p. 579.

This means that legal (formal), two-way gender equality is (in the process of) being established. The question arises, whether contemporary social roles played by women and men are equal in all MISSOC countries, or do they still require distinctive treatment with positive measures in favour of women. This is still admissible under Article 7 of Directive 79/7/EEC and confirmed in the CJEU decisions. For instance, it held that difference in pensionable age is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes.¹⁰¹ In the *Hepple* case it argued that removal of the discrimination at issue would have no effect on the financial equilibrium of the social security system of the UK as a whole. However, it went on to hold that it had been objectively necessary to introduce different age conditions based on sex in order to maintain coherence between the State retirement pension scheme and other benefit schemes.¹⁰² The challenge for the countries is to define adequate positive measures, as illustrated in the *Griesmar* case.¹⁰³

In some countries it is contended that women (especially when they predominately exercise care activities) have to be disburdened. It is argued that they should be disburdened in the time when they do care for children, disabled and old-aged family members, e. g., with measures providing childcare and long-term care professional assistance (of good quality and accessible to all). It should not be waited until they reach retirement age. At that point childcare services are usually not required any more (and it may not be assumed that retired women should have the responsibility to provide constant and full-time care for their grandchildren).¹⁰⁴

Mitigated eligibility for child caring periods

In some MISSOC countries the retirement age might be lowered for women who have raised children (e.g., in CZ), or for one of the parents, which will as a rule de facto apply to women (e.g., in DE, EE, LV, SI), or the qualifying period might be reduced (HU). The standard retirement age could be progressively lowered according to the number of children raised (CZ, EE, SI, HU - lowering eligibility period), or open entitlement to an early pension (EE, EL - for women with a minor or disabled child).

¹⁰¹ Case C-328/91 *Secretary of State for Social Security v. Evelyn Thomas and Others* [1993] ECR I-1247.

¹⁰² Case C-196/98 *Hepple and Others v. Adjudication Officer* [2000] ECR I-3701,

¹⁰³ In case C-366/99 *Griesmar* [2001] ECR I-9413 the CJEU (§64) argued that “Article 6(3) of the Agreement on Social Policy authorises national measures intended to eliminate or reduce actual instances of inequality which result from the reality of social life and affect women in their professional life. It follows that the national measures covered by that provision must, in any event, contribute to helping women conduct their professional life on an equal footing with men”

¹⁰⁴ A. Bubnov Škoberne, G. Strban, *Pravo socialne varnosti* (The Law of Social Security), GV Založba, Ljubljana 2010, p. 168.

This difference between women and men is allowed as an exception contained in Article 7(1)(b) of Directive 79/7/EEC, confirmed by the CJEU,¹⁰⁵ ECtHR¹⁰⁶ and national courts.¹⁰⁷ On the one hand such provisions may be to the detriment of men (if the exception is expressly targeting women and a lowering of retirement age for men, who have cared for their children, is not foreseen). On the other hand it may affect women more, especially if child caring periods are not taken into account in the calculation of pensions (e.g., in SI). In this case they might retire at a lower age, but receive accordingly lower pension as well.

Influence of the distinctive retirement ages in other fields

Distinctive retirement ages may lead to further differences between women in men within or outside of the social protection system. Article 7(1)(a) of Directive 79/7/EEC excludes from its scope “the determination of pensionable age for the purposes of granting old-age and retirement pensions *and the possible consequences thereof for other benefits.*” The CJEU had to define the scope of this exemption. It argued that this exemption is limited to forms of discrimination existing under the other benefit schemes, which are necessarily and objectively linked to the difference in retirement age.¹⁰⁸ That is so, where the discrimination in question is objectively necessary in order to avoid disturbing the financial equilibrium of the social security system or to ensure coherence between the retirement pension scheme and other benefit schemes.¹⁰⁹

In the UK the distinctive retirement age for women and men was applied to exemption from paying charges for the supply of drugs, medicines and appliances in the NHS. The CJEU case *Richardson*¹¹⁰ held that Article 7(1)(a) of Directive 79/7/EEC does not allow a Member State which, pursuant to that provision, has set the pensionable age for women at 60 years and for men at 65 years, also to provide that women are exempt from prescription charges at the age of 60 and men only at the age of 65.

Distinctive retirement ages might also influence access to unemployment benefits (registration as an unemployed person is possible only until the retirement age is reached) or survivor’s benefits.¹¹¹ They may also influence access to some other social advantages. For instance, in the UK, where the state pension age at the time was 60 for women and 65 for men, the House of Lords has decided a case where a married man, who was 61, wanted to visit a swimming pool together with his wife, who was of the same age. She was admitted free of charge, because she had passed

¹⁰⁵ Case C-31/90 *Johnson* [1991] ECR I-3744.

¹⁰⁶ Case *Andrle v. Czech Republic* (Appl. no. 6268/08, 17. 2. 2011), where the ECtHR found no breach of the ECHR in a pension scheme which provided for the lowering of the pensionable age for women in relation to the number of children raised, but not for men who had raised their children.

¹⁰⁷ Czech Constitutional Court decision CC 53/04, 2004. J.-Ph. Lhernould, et al., op. cit., p. 42.

¹⁰⁸ Case C-137/94 *Richardson* [1995] ECR I-3422.

¹⁰⁹ Case C-328/91 *Thomas and Others* [1993] ECR I-1247.

¹¹⁰ C-137/94 *Richardson* [1995] ECR I-3422.

¹¹¹ More cases in J.-Ph. Lhernould, et al., op. cit., p. 40.

the pension age, while he was required to pay. Moreover, such discrimination was held to be unlawful under the UK Sex discrimination Act 1975.¹¹²

However, the CJEU may exclude some social advantages from the application of Directive 79/7/EEC. It decided that a scheme under which concessionary public passenger transport services are granted also to persons after reaching the retirement age (65 men and 60 women at the time in UK) does not fall within the scope of Directive 79/7/EEC.¹¹³

4.3.2. Pension calculation

In insurance based pension schemes the amount of a pension is calculated as a certain share of the pension calculation base, whereas in residence-based schemes statutory pension is at a flat-rate and could be more gender neutral.

Direct differences

In some MISSOC countries *direct difference* between women and men in calculating an old-age (or invalidity) pension may exist. For instance, in France the full rate was applicable for certain groups, regardless of the number of years of contributions, among them female manual workers having raised 3 children.¹¹⁴ In Slovenia 15 years of insurance pension are calculated at 35 percent of calculation basis for men and 38 percent for women.

The question may be, whether distinctive calculation is in line with Directive 79/7/EEC, since this exception is not explicitly mentioned in its Article 7. The CJEU argued that Article 7(1)(a) of the Directive entitles the Member State concerned to calculate the amount of pension differently depending on the worker's sex, if national legislation has maintained a different pensionable ages for women and men. Distinctive calculation has to be necessary and objectively linked to the difference in retirement age.¹¹⁵ However, when national legislation has abolished the difference in pensionable ages, Member States are no longer authorised to maintain a difference according to sex in the method of calculating the pension.¹¹⁶

Indirect differences

Not only direct, but many indirect differences may be detected in the calculation of insurance based pensions (this is not the case in residence-based schemes, which are income neutral). Over

¹¹² R. Nielsen, *op. cit.*, p. 44.

¹¹³ Case C-228/94 Atkins [1996] ECR I-3657.

¹¹⁴ This provision was applicable in the civil servant scheme, and was abrogated by a law which entered into force on 1 January 2012. Before this law, the advantage had already become gender neutral (granted to both parents and not only to a woman).

¹¹⁵ Joined Cases C-377/96 to C-384/96 *De Vriendt and Others* [1998] ECR I-2105.

¹¹⁶ Case C-154/92 *Van Cant v Rijksdienst voor Pensioenen* [1993] ECR I-3811.

recent decades, women have entered the labour market in great numbers. However, differences between women and men that still exist in the labour market, and are mirrored in the adequacy of pensions. Career breaks often lead to a reduction in lifetime earnings and on average women earn less than men. For all these reasons, female pensioners typically have lower pension benefits than male pensioners.¹¹⁷

The extent of the differences may depend on the way the *pension basis is calculated*. It may encompass contributions (or income from which they were paid)

- from the entire career (like in BE, BG - after 1997, CY, CZ, EE - after 1999, DE, IT - for those first employed after 1996, LV, LI, LU, PL, PT - 40 years, SK, SE), or
- from the several best years (which may be any, or consecutive, or last best years), i.e., years with highest earning are taken into account (like in AT, BG - for periods before 1997 any 3 consecutive years from the last 15 years, FR, EL - last five years, HU - average income since 1988, IT before 1993 - last 5 years, MT - any best 10 years during last 40 years, SI - best consecutive 18 years, ES - last 15 years).

Longer periods may affect women to a greater extent than men (with full carrier period).

	Entire career	Best years
Pension calculation basis	BE, BG, CY, CZ, EE, DE, IT, LV, LI, LU, PL, PT, SK, SE	AT, BG - before 1997, FR, EL, HU, IT – before 1993, MT, SI, ES

Table 5: Examples of distinctive pension calculation basis

An important trend in recent pension reforms is an improvement of the financial sustainability of pension systems by tightening the link between contributions and benefits in earnings-related pension schemes (hence also in defined-benefit and not only in contribution-based NDC or DC schemes). This is done also by changing the reference for the calculation of benefits from best years to lifetime earnings. As a consequence, pension benefits will increasingly depend upon the workers' entire career.¹¹⁸

Selected best years of insurance or last period incomes usually result in a higher pension calculation base (earnings at the beginning of the career are as a rule lower compared to those at the end of it). Such calculation is more beneficial for part-time workers, especially if part-time work is reassessed to a full-time equivalent. It may also be beneficial for workers with career breaks. However, even selected best years of insurance or last period income calculations may affect women more than men, especially if they have career breaks in the period from which the pension is calculated (as it reportedly happens in EL), or if the best years average is calculated from a very long period (like 25 years in FR or raised from best 20 to best 40 insurance years from

¹¹⁷ Progress on equality between women and men in 2011, European Commission, op. cit., p. 7

¹¹⁸ Ibid. S. Renga, D. Molnar-Hidassy, G. Tisheva, op. cit., p.11.

2028 in AT - for those insured before 2005).¹¹⁹ The same applies when longer contribution periods are required for invalidity pensions/benefits. Additionally, problems arise when invalidity benefits are awarded on the basis of a means-test of a spouse's income (e.g., UK - Employment and Support Allowance, ESA), which may lead to restricted benefits for women.¹²⁰

Strengthening of the contributions-benefits ratio is done also through the *lengthening of contribution periods required to qualify for a full pension*. This means that the longer the person has paid contributions, the higher a pension will be received. This again may be to the detriment of atypical workers and might indirectly affect women more than men.

An indirect difference may occur when two rates exist (applied to average remuneration), i.e., a household rate (e.g., 75 percent in BE) and a single person rate (e.g., 60 percent in BE). If the sum of two single persons' pension rate is less than 75 percent of the household rate (calculated on the higher average earnings), then the household pension is awarded to the higher-earning spouse (who as a rule is a man). Then, the other spouse's (woman's) pension is cancelled.¹²¹

In very few MISSOC countries there is a possibility to introduce gender specific actuarial factors (life expectancy tables).¹²² It may be questioned, whether this is in line with Directive 79/7/EEC, which does not regulate this matter explicitly, but generally prohibits gender differences not only in access and contributions, but also on the benefits' side (including their calculation). Actuarial factors have been prohibited in private insurance schemes by the CJEU, effective from December 2012 onwards.¹²³

Another problem may exist if pensions are *adjusted* (indexed) below the inflation rate. As the majority of minimum pension recipients are women, they are affected by this reduction in pensions to a disproportional extent (e.g., AT, BE, EL - adjustment according to the income policy determined annually by the State).¹²⁴ In some countries pensions are adjusted (in full or partially) to the increase in wages. In this case, in the time of economic crises, pensions could be increasing. The reason may be that many low paid workers lost their jobs and the average wage increased. Such effect may be prevented by not adjusting pension amounts during the economic crisis (e.g., LV - between 2009 and 2013, RO in 2011, SI in 2012). However, such lack of adjustment again affects persons with low pensions (predominantly women) to a larger extent.

¹¹⁹ Ibid. and MISSOC tables.

¹²⁰ J.-Ph. Lhernould, et al., op. cit., p. 62.

¹²¹ S. Renga, D. Molnar-Hidassy, G. Tisheva, op. cit., p.11.

¹²² J.-Ph. Lhernould, et al., op. cit., p. 45.

¹²³ In C-236/09 *Test Achats* [2011], 1.3.2011, the CJEU established that Article 5(2) of Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services, is invalid with effect from 21 December 2012.

¹²⁴ Ibid., p. 12.

Child raising periods

It is a result of a democratic process and consent in the society what periods (for which no contributions have been paid) are considered when awarding/calculating old-age pensions. Among them are quite often child raising periods. Gender differences may also concern the advantages in respect of old-age pension schemes granted to persons who have brought up children.¹²⁵ Many MISSOC countries have opted for gender neutral provisions in this respect (e.g., AT, BG, EE, FR, HU, IE, LU, MT, PL, PT, SK, ES, SE, CH).¹²⁶

However, some countries have provisions in favour of women. For instance, in Cyprus child-raising of up to 3 years (156 weeks) per child has been granted to women entitled to a pension from 1993 onwards, who failed to make contributions because they were raising children aged up to 12 years. In Liechtenstein the years 1954 to 1996, during which unemployed spouses resident in Liechtenstein were not required to pay contributions (for example housewives), are credited as contributory years.

In some other countries (e.g., CZ,¹²⁷ DE, EL, LV,¹²⁸ NO, UK) women are given priority access to care credits on the assumption that they are the main caregiver, which can lead to gender differences. Men are disadvantaged because the periods of their parental leave are normally not credited as periods contributing to a pension. This in turn reinforces the traditional one care-giver (and one breadwinner) family model and leads to differences affecting women on the labour market and in the pension system.¹²⁹ Women are better protected in case contributions are paid for/during the period of childcare or if this period is recognised as an insurance period.

4.4. Survivors' benefits

Survivors' pensions to spouses (also to ex-spouses and extramarital partners in many countries) may be an important source of income for women. Especially women who have not entered a labour market or have given up their job in favour of caring activities could be unable to qualify for pensions in their own right. The majority of MISSOC countries regulate survivors' pensions (or other benefits), which are as a rule gender neutral.

¹²⁵ Exemption to gender equality under Article 7(1)(b) Directive 79/7/EEC.

¹²⁶ C.f. an equal pay case C-366/99 *Griesmar* [2001] ECR I-9413. The CJEU held that national legislation infringes the principle of equal pay inasmuch as it excludes male civil servants who are able to prove that they assumed the task of bringing up their children from entitlement to the credit which it introduces for the calculation of retirement pensions. K. Koldinská, *Shouldn't Fathers Raise Their Children?*, Two ECHR and ECJ Cases on Gender Equality in Pension Rights, *European Gender Equality Law Review*, No. 2/2011, p. 14.

¹²⁷ In CZ pension rights deriving from child care periods can only be claimed by one parent (mostly by women,) even when the parents divide periods of parental leave between themselves. J.-Ph. Lhernould, et al., op. cit., p. 46.

¹²⁸ In LV, prior to 1991, child care by the *mother* until the child reached 8 years of age is recognised as an insurance period if contributions have been paid.

¹²⁹ J.-Ph. Lhernould, et al., op. cit., p. 46.

However, some countries directly differentiate between women and men. For instance, in Cyprus a widower is entitled only if he is incapable of work and was mainly maintained by the deceased. Conversely, a woman who has paid insurance contributions is entitled to draw a widow's pension alongside her own social insurance pension.¹³⁰ Also, a surviving widower in Slovakia (before 2004) was entitled to widower's benefit only if he had reached pensionable age or was fully disabled at the latest 3 years from the death of his spouse. In Switzerland widows and widowers with children are entitled to survivors' benefits, but only widows without children can be entitled as well (under certain conditions). In Germany, prior to 1986, men were entitled to widower's pension only if they were predominately maintained by a wife and were not capable of securing a living.¹³¹ The ECtHR leaves a broad margin of discretion to the States.¹³²

Many countries introduced gender neutral limitations. They may concern the duration of marriage or extramarital community, caring for a child or other dependent family member or a certain age. If the latter is rather low (and the claimant is not disabled), survivors' benefit actually resembles unemployment benefit. For instance, in Germany the age requirement is gradually raised to reach 47 years in 2029. If the surviving spouse is not entitled to a (full) pension, a short-term benefit may be provided instead (e.g., AT, LI, SI, DE - minor widow/er's pension).

The more limited access of women to their own old-age pension negatively affects their surviving spouses, whose benefits may be accordingly lower. The same applies vice versa. In practice, more women, who on average have higher life expectancy than men, are entitled to a survivors' pension (based on men's contributions). They may be better off in countries where pensions for men are higher (due to the reasons discussed above, e.g., less part-time work, longer insurance/residence periods) and calculated more favourable than those for women.

Hence, survivors' benefits may actually contribute to stabilizing a male breadwinner model. They can be a disincentive for women to build up individual pension rights. For instance, in 2005 in Germany the average widow's benefit was 2.5 times higher than that of a widower.¹³³ At the same time, in Belgium the average individual pension of a married woman with a full career was slightly less than the survivors' pension of a widow who had never been employed.¹³⁴ This reflects the

¹³⁰ S. Renga, D. Molnar-Hidassy, G. Tisheva, op.cit., p. 14.

¹³¹ Neue Wege – Gleiche Chancen, Gleichstellung von Frauen und Männern im Lebensverlauf, Erster Gleichstellungsbericht, Bundesministeriums für Familie, Senioren, Frauen und Jugend, Berlin, 2012, p. 58.

¹³² In the case of *Runkee and White v the UK* (Appl. nos. 42949/98 and 53134/99, 10. 5. 2007) a denial of a widow's pension to men was challenged. The UK sought to justify it by referring to the financial hardship and inequality historically faced by older widows because of the married woman's traditional role of caring for her husband and family in the home rather than earning money in the workplace. The ECtHR recognised that historically there were differences between women's and men's economic positions, which the measure aimed to address, and emphasised that States have a wide margin of appreciation when it comes to general measures of social and economic policy, and thus in deciding when the measure was no longer justified. No discrimination contrary to the ECHR was found. I. Radačić, op. cit., p. 16.

¹³³ J.-Ph. Lhernould, et al., op. cit., p. 54.

¹³⁴ Ibid.

situation in the labour market (gender pay gap) and reliance on survivors' benefits for income in old age.

Reflecting the goal of promoting the build-up of individual pension protection by women, a number of countries have tightened the conditions of entitlement for survivors' pensions in recent years. In some MISSOC countries survivors' benefits to spouses are not available at all (e.g., in LV, DK - no widow's or widower's pension for a decease after mid-1992, or where the widow/er is under the age of 62, IS - no national pension), while in others only short term benefits are provided. The latter is the case in the Czech Republic (pension is granted for a period of one year).¹³⁵ In Sweden survivors' pensions have been phased out for those who married after 1989.¹³⁶ Adjustment pension is limited to one year and is maintained for as long as the surviving spouse lives with a dependent child below 12 years of age (if the child is between 12 and 18 years the adjustment pension can be paid for an additional year).

Despite the fact that Directive 79/7/EEC does not apply to survivors' benefits, it could be argued that derived rights of widow/ers may produce differences between women and men, which are difficult to justify. An alternative, next to a short time transitional benefit, could be individual rights, e.g., in form of an unemployment benefit (coupled with activation measures), invalidity benefit (for disabled spouses), or social assistance (replacing means-tested widow/er's benefits). Although legally not binding, and not often cited, the Recommendation 92/442/EEC encourages the Member States to guarantee a level of resources to everyone that secures human dignity; to guarantee social integration of all persons; and the labour market integration of those who are in a position to exercise a gainful activity. It also encourages Member States to provide employed workers who cease work at the end of their working lives or are forced to interrupt their careers owing to sickness, accident, maternity, invalidity or unemployment, with a replacement income.¹³⁷

4.5. Accidents at work and occupational diseases

Some MISSOC countries operate a special insurance scheme for accidents at work and occupational diseases (like AT, BE, BG, CZ, DK, FI, FR, DE, IS, IR, IT, LI, LV, LU, PL, PT, SE, UK), while others provide (partial or full) protection in uniform health and pension (or invalidity and survivors') insurance schemes (like EE, EL, HU, MT - benefits in kind provided under national health scheme, NO - under national insurance scheme, RO - long-term benefits are provided by the public system of pensions, SK, SI, ES, NL). Also, in the latter case easier access to benefits and their more favourable scope is provided, if the cause lies in an accident at work or an occupational disease (insured persons are perceived as more deserving).

¹³⁵ After that it is granted only to survivors who have reached retirement age or are less than 4 years away from it, suffer from third degree invalidity, or are caring for a dependent child, helpless child or a parent.

¹³⁶ J.-Ph. Lhernould, et al., op. cit., p. 57.

¹³⁷ J. Van Langendonck, op. cit., p. 334.

	Special scheme	Uniform scheme
Accidents at work and occupational diseases	AT, BE, BG, CZ, DK, FI, FR, DE, IS, IR, IT, LI, LV, LU, PL, PT, SE, UK	EE, EL, HU, MT, NO, RO, SK, SI, ES, NL

Table 6: Examples of distinctive schemes providing protection in case of accidents at work and occupational diseases

There are as a rule no *direct differences* in schemes covering accidents at work and occupational diseases, including benefits for dependants. Among the exemptions is Cyprus, where the basic invalidity pension is increased in case of dependants. The spouse of a male beneficiary is a dependant if she lives with him, or has been maintained by him, and receives no pension from the Social Insurance Fund. The spouse of a female beneficiary is a dependant if he is unable to support himself, is wholly maintained by her, and receives no pension from the Social Insurance Fund.

More *indirect differences* affecting women especially in occupational disease schemes could be detected. It is argued, that compensation for occupational diseases plays a key role. At an individual level, it represents support by the social security system to ensure continuity of income. On a collective level, it gives special visibility to particular occupational health problems, thereby helping to build awareness among all those concerned with prevention policies.¹³⁸

However, there is a problem of filtering of work-related diseases. It is argued, that there is a significant systematic distortion. Some diseases are more frequently dismissed than others. Furthermore it is argued, that women continue to lose out in occupational disease recognition systems across Europe. It may be largely ignored discrimination. Where occupational diseases are concerned, women find it harder than men to access social security (or private insurance) benefits.¹³⁹ It is argued, that this may cause a vicious circle: there is less prevention in women-dominated sectors, which results in less attention being paid to the appearance of women work-related health problems and reinforces stereotypes about women's work being less hazardous to health.

Women are more likely to work in occupations and sectors which are traditionally associated with "female qualities/talents", like caring for others or organising social arrangements. Based on the historical development of compensation for occupational diseases, it could be assumed that the labour market (mainly male dominated until recent decades and mirrored in social protection schemes) cannot accommodate specifically female work patterns.¹⁴⁰ Men are, as a rule, compensated for a much wider range of diseases.

¹³⁸ L. Vogel, Women and occupational diseases. The case of Belgium, ETUI, 2011, p. 5.

¹³⁹ Ibid. p. 7. See also D. Tieves, Women and occupational diseases in the European Union, ETUI, 2011.

¹⁴⁰ Ibid., p. 37.

Such an approach has several consequences. It takes more account of physical, often measurable, factors in working conditions, like chemical, physical or biological agents. It makes it harder to take intangible factors related to work organization into account, like repetitive work,¹⁴¹ night work, work intensity or violations of dignity. The same applies to multifactorial aetiology (poor performance in recognition of work-related cancers)¹⁴² and work-related psychological problems or work-related burnout.

All risk assessment should consider whether a specific job can be accessed by both, women and men in non-health-impairing conditions. When a disease occurs, it should be possible to argue that it is work related, either in an open system (SE) or mixed system, where a list of occupational diseases is supplemented with a possibility to prove that a non-listed disease is work related (AT, BE, BG, CZ, DK, EE, FI, FR, DE, IR, IT, LV, LI, LU, PT, CH). It is more difficult to change the list of occupational diseases (only listing is applied in CY, EL, HU, IS, LT, MT, NO, PL, RO, SK, SI, ES, UK), which reflects male jobs in traditional industries more than the reality of work today.

	Open	Mixed	List
Recognition of occupational diseases	SE	AT, BE, BG, CZ, DK, EE, FI, FR, DE, IR, IT, LV, LI, LU, PT, CH	CY, EL, HU, IS, LT, MT, NO, PL, RO, SK, SI, ES, UK

Table 7: Examples of various possibilities of recognising occupational diseases

A critical review of the list of occupational diseases from a gender perspective and improving the opportunities that the open system could offer is important from the perspective of gender equality in social protection. The new strategy for health at work for the period 2013-2020 is being prepared in the EU, which may be a good opportunity to take on board the appeal for more gender equal recognition of occupational diseases.

4.6. Family benefits

Family benefits are quite distinctive across the MISSOC countries. They may be income related or flat-rate, and depend on the number and age of the children as well as family income. The distinction to maternity/paternity benefits is that family benefits are intended for covering part of the expenses for upbringing and development of a child.¹⁴³ They are not provided in a short period

¹⁴¹ The way women’s work is perceived is apt to minimize the risks, to trivialize a combination of factors as being those of “ordinary life”: repetitive work, tiring or painful positions, monotonous work, exposure to hazardous chemicals in what are considered ancillary or peripheral activities (cleaning, packaging, etc.). L. Vogel, *op. cit.*, p. 38.

¹⁴² Only DK recognises breast cancer as an occupational disease, subject to conditions. *Ibid.*, p. 50.

¹⁴³ Compare with decision of the CJEU in joined cases C-245/94 *Hoever* and C-312/94 *Zachow* [1996] ECR I-4895. The Court also confirmed that family benefits are outside the scope of Directive 79/7/EEC. See also Article 1(z) of the Regulation 883/2004. For the coordination purposes it defines family benefits as “all

before, during and after the childbirth, providing individual protection of a mother or a father and a baby. Hence, certain benefits provided to mothers who are not entitled to insurance based benefits (e.g., maternity grant to unmarried mothers not entitled to maternity grant in CY, lump-sum allowance to pregnant women not entitled to maternity benefit in BG, maternity allowance payed to women without any loss of income during maternity leave in LU) are considered as maternity benefits, even if they are mentioned as family benefits in the MISSOC tables.

However, family benefits which may be provided to a mother are birth grants, e.g., in BG, CZ, FI, EL - reimbursement of confinement expenses, IT, LU), although they may be provided also to a father on an equal footing (e.g., BE, DK, EE, FR, LV, LI, LT, PL, SK, SI, ES, UK) or in exceptional cases (e.g., in CZ only if the mother dies).

Other family benefits are provided either to a mother or a father who is bringing-up a child (e.g., BG, DE, PL, SI) or caring for a child with disability (AT, BE, BG-only mother, CZ, DK, EE, FI, FR, EL, HU, IS, IE, IT, LV, LT, LU, MT, PL, PT, RO, SI, ES, SE, CH - one canton, UK). Hence, there are, as a rule, no direct differences between women and men (an exception may be BG, where only a mother is entitled to a benefit for caring for a child with disability).

	Birth grants	For bringing-up children	Children with disabilities
Family benefits	BE, BG, CZ, DK, EE, FR, FI, EL, IT, LU, LV, LI, LT, PL, SK, SI, ES, UK	BG, DE, PL, SI	AT, BE, BG, CZ, DK, EE, FI, FR, EL, HU, IS, IE, IT, LV, LT, LU, MT, PL, PT, RO, SI, ES, SE, CH, UK

Table 8: Examples of distinctive family benefits

Family benefits may result in *indirect differences* and even contribute to the reinforcement of traditional gender roles and women's economic dependence on a male breadwinner. For instance, parental allowances in the Czech Republic and Latvia are not linked to parental leave, and the family may receive a higher benefit if the father applies for it and continues to work, while the mother stays home to care for the child.¹⁴⁴

In Norway, the cash benefit for families with small children is criticised for marginalizing low-income women in the labour market. The benefit is paid only for childcare at home, thus creating an incentive for women not to (re)enter the labour market (this is not the case when the benefit is provided to families with an in-house-nanny). Similar criticism has been voiced for the Swedish childcare allowance.¹⁴⁵ Also, in some other countries benefit is provided for a parent taking care of

benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.”

¹⁴⁴ J-P. Lhernould, et al., op.cit., p. 87

¹⁴⁵ The Care Allowance allows parents (used almost exclusively by mothers) to remain at home longer or reduce the hours that their child spends in day-care. It encourages women to stay outside the labour market and creates increased pressures on men to work longer hours to compensate for the loss of income.

a child instead of putting him/her into nursery school (e.g., in DK - between 24 weeks to 6 years, depending on the municipality, FI, FR, NO, SK), or caring for a child with disability at home (e.g., DK, IS, IE, NL).

Indirect differences may be detected also when one parent (usually the mother) is entitled to work part-time due to parenthood (e.g., in SI)¹⁴⁶ and rather low family benefit is provided for the non-working/caring part (in SI only social security contributions from a minimum wage, there is no direct cash benefit). This influences all income related social protection benefits, which will be lower, and women's economic independence might be endangered.¹⁴⁷ Conversely, France introduced a benefit that offers targeted support to parents who have made the choice to retain their job while raising a child below six years of age.¹⁴⁸

In some MISSOC countries specific benefits are provided to *single-parent families*, either as a separate family benefit (e.g., in DK, IS - single parent allowance for two or more children, LI, NO, PL) or a supplement/increase to other family benefits (e.g., in EE, FI, EL, HU, IT, MT, PT, RO, SI). Single parent families are predominately composed of a mother and a child or more children. Sometimes an income threshold is stipulated (e.g., in FR for the *Revenu de solidarité active*, IE), benefiting mainly women with children and low income. There may be other benefits for single parent families in the tax law (e.g., in AT), or in social services (LT - half price for preschool care, SI), all targeted to more equal opportunities in the society for a parent (a woman) with children.

4.7. Unemployment

Social risk of unemployment differs from other social risks, for which benefits are provided to persons who are unable (or not expected) to work. In case of unemployment persons are able to work and have to be willing to find (full-time) employment. Certain features of a male dominated labour market when unemployment benefit schemes were introduced¹⁴⁹ are still visible today, which might lead to gender differences. Also, benefits for elderly unemployed (like early retirement benefit and bridge pension in PL) are accessible to female and male unemployed persons under different (age and insurance) conditions.

In the MISSOC countries there are few *direct distinctions* based on gender. For instance, distinctive retirement ages for women and men (like in LT, CH, as described above) can be reflected in the definition of an unemployed person, who is as a rule a person of working age. The status of such a person (and hence the status of an unemployed person) ends upon reaching the

¹⁴⁶ In SI it is possible for a parent to utilise the right to work part-time until the third year of a child, or sixth year of the youngest child in case of two or three children, or even leave the labour market until the youngest child reaches 10 years of age at four or more children.

¹⁴⁷ A. Bubnov Škoberne, G. Strban, op. cit., p. 344.

¹⁴⁸ J-P. Lhernould, et al., op.cit., p. 84.

¹⁴⁹ The first unemployment insurance in Europe was introduced by the 1911 National Insurance Act in UK.

retirement age. This means, that in countries with lower pensionable age for women, women have to leave the labour market earlier than men.

Direct differences may also be detected in accessing unemployment benefits. For example, in the UK the contribution-based Jobseekers' Allowance is available to all employed persons, except married women who chose before April 1977 not to be insured.

However, there are more *indirect differences* in accessing unemployment benefits. In some countries persons with very low income (e.g., in AT below €376.26 per month, IE less than €38 per week, NO less than 1.5 times the basic amount as set annually by royal decree) or very short working time (e.g., in BG employees working less than five working days or 40 hours per month, in SE less than 80 hours or 50 hours per month) are not insured for the risk of unemployment. This may include low paid jobs and part-time workers, which are predominantly women.

Requiring a long insurance period may also present a barrier in accessing unemployment benefits. Therefore, access may be easier for insured persons (mainly women) with breaks in careers (e.g., employed on the basis of fixed-term contracts with interruptions) and those working part-time, if a certain (shorter) qualifying period in a longer time span is required (e.g., in EL-360 days in last six years, FR four months in the last 28 or even 36 months for those over the age of 50, DK for basic benefit one year in previous three, SI - prolonged in the times of economic crisis from one in the last 1.5 years to nine months in the last two years, AT - one in the last two years, similar in BE, BG, EE, FI, DE, EL, HU, LV, LI, LT, LU, MT, PL, RO, CH, NL, UK, more in PT - 450 days in 2 years, SK-two in last 3 years).

Nevertheless, some countries provide maximum benefits only to those consecutively employed and only minimum benefits to those who were not (e.g., in IS 12 months of consecutive work for maximum benefits and 3 months of work during the last 12 months for minimum benefits). This may be a difference to the detriment of those with breaks in their careers (usually women).

The legal position of women is better protected in countries where parental benefits (exercised usually by a woman) are taken into account as insurance period for meeting the eligibility conditions and calculation of an unemployment benefit. For instance, in the Czech Republic the condition of 12 months insurance (in the last two years) can also be completed by substitute periods of employment (e.g., personal care for a child). In Sweden at most 2 months in the working condition may be replaced by leave of absence with parent's cash benefit. In Lithuania unemployed persons who have taken a childcare leave from the first until the third year of a child are eligible for unemployment benefit. In Norway pregnancy benefits, parental benefits and benefits in the case of sickness that is related to pregnancy count as income from work.

Partial unemployment schemes, or a lack of them, may also give rise to gender differences. Access to (partial) unemployment benefit may be limited for part-time workers (usually women), even if

they would be seeking full-time employment. In some MISSOC countries partial unemployment is not recognised as a social risk and no unemployment benefit is provided (e.g., CY, CZ, EE, HU, LV, LT, MT, PL, RO, SK, NL, UK). In some countries (like SI) it is recognised only when exiting unemployment, but not when entering it. Lack of a (full-fledged) partial unemployment scheme may affect part-time workers (usually women) more than full-time workers.

Even in countries with partial unemployment schemes gender differences may be detected. Partial unemployment benefits may be targeted to male industries (like construction for meteorological reasons, e.g., AT, DE, EL, IT, DK, LI, CH). Conversely, partial unemployment schemes may indirectly provide more favourable treatment of women (e.g., in AT part-time allowance for elder workers: men can reduce their working time to 40-60 percent from the age of 58 and women already from the age of 53).

Indirect gender differences may exist also when the amount of an unemployment benefit is calculated. The general difference reflects the gender pay gap in the labour market. In the countries where income or contributions-related benefits are provided, they may be lower for women. They may be worse off also, when part-time work gives entitlement only to proportional benefits (like in IS). This is not the case when flat-rate benefits (like in UK - higher for those ages 25 and more) or minimum benefits, favourable for low income earners, are provided (like in AT, BE, FR, EL, PT, SI, ES, but in BG they may be lower than minimum for part-time workers).

4.8. Guaranteeing minimum income

According to EU law, especially Directive 79/7/EEC, Member States have a broad margin of discretion in regulating social assistance schemes. Social assistance is only covered by the Directive, if it has the same objective, i.e., supplements or replaces the covered schemes.¹⁵⁰ In the MISSOC countries minimum income is guaranteed either by local entities (e.g., in AT, DE, IS - topped up by the state social assistance, IT, ES - for the risks of old-age and invalidity, SE, CH, UK) or the State itself, sometimes in cooperation with local entities (e.g., in CZ, FR, EE, MT, PL, PT, RO, SI, ES - for the risk of unemployment, NL). Social assistance is provided in all States with the exception of EL (due to broad social insurance coverage, social assistance is not well developed - only non-contributory housing allowance is provided). Social assistance is as a rule financed out of the (local or state) budget.

It is of a subsidiary legal nature, which means that all other options of receiving income from social insurances, savings, maintenance, (any, not just suitable) employment and work, etc., have to be exhausted. Social assistance is therefore income- and means-tested, and tailored to the needs of the claimant. It may be general, provided to all below a certain threshold and/or categorical, provided to the sick (e.g., MT), disabled (e.g., in IE, LI, LU, ES), widowed (e.g., in IE, LI), old-

¹⁵⁰ Social assistance has to be »directly and effectively linked to the protection provided against one of the risks specified« (CJEU case C--228/94 *Atkins* [1996] ECR I-3657).

aged (e.g., in BG, CY, HU, LI, LT, PT, ES, UK), and unemployed (e.g., in EE, HU, MT, PT, ES, DE - basic security benefit for jobseekers, UK) or families (e.g., BE) with income and means below a certain threshold.

Social assistance is important for guaranteeing a decent living and alleviating (absolute and relative) poverty in each country. However, in the times of economic crisis social assistance may be overemphasised (in relation to other social protection schemes), and it may produce gender differences.

Social assistance is as rule recognised as an individual right. However, when the required scope of the assistance is established, income and assets of all family/household members are taken into account. It is therefore essential that family/household members and income/assets are precisely defined. Taking income/assets of family members into account may negatively influence the dependence of women (who are more often in a weaker position in the labour market, i.e., in low paid jobs and with many career interruptions in comparison to men) and may promote a male breadwinner model.

Legislative acts of many MISSOC countries provide a certain margin of discretion (like in BG, CY, DK, FI, IS, NO, PL, SI, but not in DE - basic security for jobseekers, LI, LU, ES, CH) when taking concrete (administrative) decisions. Although discretion should be exercised according to the purpose of the legislative act and stay within its limits, subjective judgments in individual cases are possible. This may lead to gender differences. Reportedly, in some countries (e.g., SE) in practice more social (assistance) services are provided for elderly men, as it is assumed that women are still able to clean and cook their own food. As daughters, more often than sons, are expected to help their elderly parents, more services tend to be provided in cases where there are no daughters.¹⁵¹

4.9. Long-term care

All MISSOC countries know long-term care (hereafter LTC) benefits in their social protection systems. However, solutions are rather distinct. One of the reasons may be that the social risk of reliance on LTC is connected to other social risks. It may relate to the reduction of personal autonomy due to sickness, invalidity, an accident at work or occupational disease. It may also relate to family members (e.g., special family benefits for children with disabilities). Nevertheless,

¹⁵¹ J-P. Lhernould, et al., op.cit., p. 92.

it is predominately a phenomenon related to old-age.¹⁵² On average women live longer than men. Hence women present the majority of persons requiring long-term care benefits.¹⁵³

Long-term care benefits may be organised as a special branch of social insurance (like in BE, DE, LU), provided in a residence-based scheme (like in ES since 2006), or in a special, *sui generis* scheme (like care allowance in AT). Due to their relation to other social risks they may be provided in a mixed system, i.e., as pension supplements (e.g., in FR, PT, LI, SI), part of health care (nursery hospitals or homes, e.g., in LI, NO, NL) or social services (e.g., in CY, CZ, DK, EL, LV - for elderly, disabled and children, LT, SE, UK - health and social care). They may be linked to social assistance (e.g., in EE, DE - care assistance next to care insurance, SK - means tested cash benefits), and provided to severely disabled persons (e.g., in FI, FR) and war invalids (e.g., in SI). Special family benefits may be provided to parents of children reliant on long-term care¹⁵⁴, or for education of such children (e.g., in FR). Also, a combination of some/all mentioned options is possible (e.g., FR, HU, IT, LI, MT, PL, PT, RO, SI, CH). As a rule there are no direct differences between women and men in the legislation governing LTC benefits.

Certain *indirect differences* may be detected when *providing* them. Women (especially elderly) are not only predominately requiring LTC benefits, but are also predominately providing long-term care services. They are in a weaker position in the labour market, with part-time work and interruptions in their careers. Therefore, the purpose of granting LTC benefits is rather important. The question is what kind of long-term care delivery is supported. They may be intended to support caring (female) family members, or to promote professional delivery of long-term care.

It may be argued, that benefits in kind, having priority over cash benefits (e.g., in DK, EE, FR, IS, LV, LU - benefits in kind can be partially converted into cash benefits, NO, SI, ES)¹⁵⁵, may promote professional delivery of long-term care. On the contrary, benefits in cash, when there is no obligation to spend them on (professional) care (which would in essence make them benefits in kind),¹⁵⁶ may promote services of informal (family) caregivers.

If the State opts for the provision of benefits in kind, it should either organise long-term care services (home care, semi or full residential care), or delegate the realisation of this legal duty to other public and/or private institutions. For instance, in Spain priority is given to benefits in kind (care services), and delivery of long-term care should be primarily the task of the State and not the

¹⁵² For instance, at the end of 2009, there were 2.34 million persons in need of long-term care benefits in Germany. As much as 83 per cent of them were aged 65 years or more (35 per cent were older than 85 years). Deutsches Statistisches Bundesamt, 2011, p. 6. For some other countries *OECD Health Data 2011*.

¹⁵³ For instance, app. two thirds of long-term care recipients in DE and AT are women. G. Strban, Distinctive long-term care schemes as a response to changed family structures and demographic situation, *Pravnik*, No. 3-4/2012, p. 249.

¹⁵⁴ See under point 5.6., above.

¹⁵⁵ Extensively, Y. Jorens, B. Spiegel et al., Coordination of Long-term Care Benefits - current situation and future prospects, trESS Think Tank Report 2011 (www.tress-network.org, September 2012).

¹⁵⁶ CJEU decisions in cases C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, and C-466/04 *Acereda Herrera* [2006] ECR I-5341.

family.¹⁵⁷ In Sweden the municipalities are by law responsible to provide elderly care and the major part of daily personal assistance is carried out by professionals.

Conversely, in countries providing mainly cash benefits, like in Austria or Belgium, it is expected that family members are given priority in providing long-term care. The Austrian federal care allowance is paid directly to the beneficiary and may be spent according to his or her discretion (or saved and not spent at all).¹⁵⁸ It is intended to cover only part of the increased costs due to reliance on long-term care. Also in Germany the priority is given to home care over institutional care. The legislator explicitly emphasised the intent to support readiness of family members and neighbours to provide long-term care at the beneficiaries' home.¹⁵⁹ Such care is usually provided with large personal sacrifice of the informal (female) carer.¹⁶⁰ Especially when cash benefits are much lower than the value of benefits in kind, their purpose is to provide some material support to the informal caregivers (family members, friends or neighbours), who should be primarily responsible for providing long-term care.¹⁶¹

Hence, low cash benefits do not only enable family care (and grey/black economy), but force families to provide long-term care themselves,¹⁶² i.e., mainly women (wives and daughters between 40 and 60 years of age).¹⁶³ When long-term care is mainly the task of a family, the supervision and quality of care delivery is rather difficult to guarantee.

In addition, family law has to be taken into account next to social protection rules. In some States there is no legal responsibility for spouses or children to care for their elderly relatives (like in SE). In others such responsibility might be stipulated. Even then it does not mean that they should provide LTC services themselves. They may, but they could also contribute towards the payment of professional caregivers.¹⁶⁴

¹⁵⁷ Public institutions providing long-term care are clearly given the priority, but it seems that often the necessary infrastructure is not yet in place. In addition, in some parts of Spain unemployment is rather high and any income for caring family members is welcome. Hence, despite the good intentions of the legislator, it might happen that (at least in less developed parts of Spain) caring of family members will remain the main "profession" of women. G. Strban, op. cit., p. 267.

¹⁵⁸ Only if the goal of care allowance could not be achieved, the benefit in kind might be granted instead. M. Greifeneder, G. Liebhart, *Pflegegeld Handbuch*, Manz, Wien 2008, p. 68.

¹⁵⁹ Paras. 3 and 4 SGB XI. The notion of informal caregiver (*Pflegeperson*) is defined in Para. 19 SGB XI.

¹⁶⁰ K. Peters, in: Stephan Leitherer (Hrsg.), *Kasseler Kommentar Sozialversicherungsrecht, Soziale Pflegeversicherung SGB XI*. C. H. Beck, München, Stand 2010, Para 3 SGB XI, p. 1.

¹⁶¹ M. Dammert, *Angehörige im Visier der Pflegepolitik, Wie zukunftsfähig ist die subsidiäre Logik der deutschen Pflegeversicherung*. VS Verlag für Sozialwissenschaften, Wiesbaden 2009.

¹⁶² W. J. Pfeil, op. cit. (2007), p. 5.

¹⁶³ On the situation in Germany A. Büscher, W. Schnepf: *Die Bedeutung von Familien in der pflegerischen Versorgung*, in: D. Schaeffer, K. Wingefeld (Hrsg.): *Handbuch Pflegewissenschaft*. Neuausgabe, Juventa Verlag, Weinheim und München 2011, pp. 474, 476.

¹⁶⁴ See also MISSOC Secretariat, *MISSOC Info 1, Long-term care*, May 2011 (http://www.missoc.org/MISSOC/INFORMATIONBASE/OTHEROUTPUTS/INFO1/2011/INFO%201%20synoptic%20report_EN_Final_070911.pdf, August 2012).

A majority of MISSOC countries have recognised the need for social protection of the (informal) caregiver.¹⁶⁵ Benefits to a caregiver range from carer's leave, carer's allowance and social insurance coverage (or recognising care periods in pension insurance), over respite care, to employment of carers. Reliance on LTC could present a double social risk, for the person reliant on LTC and the person (usually a woman) providing LTC benefits.

5. Conclusions

Social protection systems of the MISSOC countries are not completely gender neutral. Sometimes gender differences lie in the nature of a specific sex, and social protection benefits (e.g., providing health care at birth, maternity and also non-transferable paternity benefits, which may be reflected also in pension schemes) have to take this into account.

Other gender differences may exist in a more overt form, like distinctive retirement ages in some MISSOC countries, which may influence unemployment benefits as well. Differences have to be supported by the development of factual relations in the society and be proportionate to the pursued goal. In contemporary societies which are not based on the male breadwinner model, objective justification for gender differentiation is more difficult to defend. Hence, many MISSOC countries have already, or are in the process of equalising the retirement ages. They consider that positive measures for the under-represented sex (where men are taken as a reference group) are no longer required and strive for two-way prohibition of gender discrimination.

There are still some gender differences in social protection schemes of the MISSOC countries, which are present in a more covert or disguised form. They usually relate to the weaker position of women in the labour market, with interruptions in their careers, part-time and low paid work, which is mirrored in the (employment based) social protection schemes. Longer insurance periods or no access for low income earners to social protection schemes mainly affects women. The same applies, if longer insurance/residence periods are required for the calculation of benefits.

In addition, lists of occupational diseases may be more adjusted to the male labour force than to work predominately performed by women. Indirect difference may be the lack of partial unemployment schemes or benefits (even if there are any, they may be male industry oriented), derived and means-tested schemes, and family benefits encouraging women to take care of the children at home. Also, some long-term care schemes are oriented to support informal (predominately female) caregivers. The distinctive expectations from women may be detected also in administrative practices (providing fewer benefits to men with wives or daughters who could provide care activities).

¹⁶⁵ No benefits for caregivers are foreseen only in BE, LI, LT, and PT.

MISSOC countries themselves decide which benefits under which conditions will be provided. By doing so, no distinctions should be made between women and men, which do not lie in the nature of a specific sex or could not be objectively justified with the aim of providing (substantive) equality. In doing so, they are supported, or even obliged by the EU law, especially when the CJEU is approaching the right to equal treatment widely and exemptions narrowly. Importance of the EU law in abolishing certain differences in social protection systems has to be emphasised, despite the fact that Directive 79/7/EEC could be modernised, similar to other non-discrimination directives.

Taking into account international legal standards, everyone, as a member of society, should have the possibility to freely develop his or her own personality and freely choose his or her life style. It should not be believed that such things as “natural obligations of a woman” (e.g., in caring activities) or “natural obligations of a man” (e.g., in providing income) actually exist.

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