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Abstract

Departing from the ECJ's Huber case where Germany was condemned for discriminatory processing of personal data and which suggests that there is a strong kin between data protection and discrimination issues, this chapter is an attempt to further compare the two fundamental rights (i.e., non-discrimination, and data protection).

Beyond their place in the EU legal order, their respective object or scope, this chapter will contend that these two human rights increasingly turn to the same mode of operation, including, *inter alia*, reliance upon administrative structures and procedures, or the endowment of citizens with a bundle of individual rights.

We will argue that this similarity can be understood in the light of their nature as regulatory human rights, that is, embodying the logic of negative freedom (*cf.* Berlin).

The final section will examine situations of overlap between the rights, building upon the *Huber* and *Test-Achats* cases. This will lead to final conclusions on how to best articulate these rights.

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4.1 The *Huber* case: how the German Register of Foreign Nationals (AZR) raises both questions of data protection and anti-discrimination.

In recent years automated data mining and profiling on large amounts of retained data has become an increasingly important tool in both the public and private sector. One salient example of the legal controversies arising from such practices is the contestation of the German *Ausländerzentralregister* (AZR) in the *Huber* case (ECJ, 2008). The contested register is a central, nation-wide, automated database in which all foreigners who live or have lived in Germany for more than three months are registered. At the moment (2011) the AZR contains data about more than 20 million individuals, both relating to asylum seekers and to foreigners holding a German residence permit. Approximately a quarter of these data relates to EU citizens. A wide range of officials can access the database: apart from the German Immigration authorities and the Secret Services approximately 6.500 other public bodies (e.g. courts, social services, police) can consult it.

The facts leading to the *Huber* case began in 1996, when Mr. Huber, an Austrian national, moved to Germany. As an EU national there was no impediment for him to work and live in another member state but, as prescribed by the AZR law, his personal data had to be processed in the AZR. In 2000 Mr. Huber contested the presence of his data in the database as discriminatory and requested their deletion: a register like the AZR does not exist for German nationals and the AZR data are also

subject to secondary use for purposes of criminal investigation and population statistics. In the legal proceedings that followed, the national judge felt compelled to pose several preliminary questions to the European Court of Justice (ECJ). Before the Court, he questioned the compatibility of such a database with the prohibition of nationality-based discrimination among Union citizens, and its legitimacy and necessity from the point of view of data protection. Second, the question was put forth as to whether the secondary use fell within the scope of the Data Protection Directive. In its ruling, the ECJ stated that the use of a central register like the AZR can be legitimate in principle, but only in as far as it is necessary to support authorities in a more effective application of legislation on the right of residence, and personal data should not be stored for other purposes, such as criminal investigations and the creation of population statistics (§§58-59). For the latter purpose anonymised data should be used. The ECJ referred the case back to the national court (Higher Administrative Court for the State of North Rhine-Westphalia 24 June 2009),which decided that in the case of Mr. Huber the storage of data in the AZR was legitimate[1].

Most interesting, for us, is the question concerning the legal concepts the ECJ used to address the issues at stake. Whereas contested storage of data in databases is normally addressed in terms of privacy and data protection, it appears that the issue of discrimination is at the core of this case, and that the Court established a very interesting link between data protection and non-discrimination. Indeed, the Court addressed the issue of the presence of a non-national in a database for secondary purposes of crime fighting, from the perspective of discrimination (and thus not solely data protection, §§ 78-79).[2]
Therefore, beyond the crucial data protection issue of the secondary use of personal information available in specific databases, the issue at stake here is the **discriminatory consequences of data processing operations**.

Departing from the link made by the ECJ between discrimination and data processing, this article will further explore the relation between the rights to data protection and anti-discrimination, and will undertake a comparative analysis between them.

The first part of this chapter will be dedicated to a comparison of the legal architecture of the two rights.[3] Beyond the similar fashion in which they are integrated into the EU legal order, we will focus our attention on the object of the two legislations. We will show that whereas the object of data protection legislation (i.e., the processing of personal data) is a fairly straightforward notion, the same cannot be said concerning discrimination. Closely linked to this first remark, is the scope of both legislations. Here too, contrarily to data protection's scope, which is even, the scope of anti-discrimination is scattered, not least because of the different Directives that

[1] According to the authorities responsible for the AZR Huber's data are necessary for the application of the law concerning his right of residence on German territory and are only used for this purpose. Based on this statement the national judge (Higher Administrative Court for the State of North Rhine-Westphalia, 24 June 2009) rejected the request to remove Huber's data from the AZR, where they are probably still kept until present day.
[2] Advocate General Poiares Maduro (*Opinion Huber*, C-524/06, 2008, §§ 5 and 21) reached the same conclusion by stating that although the purpose of crime fighting is *prima facie* legitimate, it does not justify such a difference in treatment with regard to the processing of personal data, which, ultimately, casts a "unpleasant shadow" over non-national EU citizens.
[3] A comparison of the theoretical underpinnings of the legal similarities and differences is beyond the scope of this chapter.

have been adopted and that each protect a specific ground. Finally, we will embark in a comparison of the Legal Regime of the two rights. This exercise will evidence the presence in both legislations of an administrative body as well as a bundle of subjective rights (i.e., supportive rights). We will argue that the differences put forth between the two Legal Regimes can be traced back to a fundamental difference, that is, whereas data protection concerns one particular action, anti-discrimination concerns one precise legal outcome no matter the action it stems from. However, we will also argue that these differences are not as fundamental as they might appear *prima facie*, and that future legislative might even severely mitigate them.

In the second part of this chapter, we will try to make sense out of the comparison of the Legal Regime by going back to the theoretical underpinning of the two rights. As human rights, they are fundamentally bound to the democratic constitutional state, and hence to the notion of freedom. Building upon Berlin's dichotomy between positive and negative freedom, we will make the case that both data protection and anti-discrimination embody the logic of negative freedom, which (at least partly) accounts for their similar Legal Regime, and justifies that we qualify them as "regulatory human rights".

The third and last part of the chapter will be dedicated to situations of overlap. We will show how one given legal situation can be simultaneously apprehended from the two lenses, by building upon the *Huber* case already mentioned in the introduction, and the *Test Achat* case.

Final conclusions on how to best articulate these rights will follow.

4.2 Place of the two rights in the EU legal order

The protection of both rights follows the same pattern from the perspective of the hierarchy of norms: both rights are enshrined in the *EU Charter of Fundamental Rights* (EUCFR), and can therefore be considered as autonomous fundamental rights with a general scope and direct effect. Article 8 of the Charter guarantees the protection of personal data, and Title III is dedicated to equality and is composed of a general provision on anti-discrimination (art. 21 EUCFR), and of provisions regarding specific[4] groups of people (art. 22-26 EUCFR). Furthermore, both rights are also incorporated in specific provisions of the *Treaty on the Functioning of the European Union* (data protection in art. 16 TFEU; anti-discrimination in art. 18-25 TFEU).

In addition to this, these two rights are further developed and implemented by specific legislations in a similar design. As far as data protection law is concerned, the main piece of legislation is Directive 95/46/EC commonly known as the *Data Protection Directive*. Since the publication of this seminal piece of legislation data protection has evolved significantly, which has resulted in the adoption of several additional instruments such as the *Data Protection Regulation* (45/2001/EC), the *e-privacy Directive* (2002/58/EC), or the *Council Framework Decision on Third Pillar (police and judicial cooperation) Data Processing* (2008/977/JHA). Similarly, anti-discrimination legislation in the EU has undergone a long evolution of expansion

[4] Articles 22-26 EUCFR are respectively dedicated to cultural, religious and linguistic diversity; equality between women and men; the rights of the child, of the elderly, and of persons with disabilities.

giving content to the general principle of equality and non-discrimination.[5] The EU legislative framework is composed of the *Race Equality Directive* (2000/43/EC), the *Employment Equality Directive* (2000/78/EC); the *Gender Recast Directive* (2006/54/EC), prohibiting gender discrimination in employment and occupation and, also regarding gender, the *Gender Goods and Services Directive* (2004/113/EC). Finally, and to a lesser extent, one can mention the *Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*, and the *Proposal for a Council Directive of 2 July 2008 (Proposal COM (2008) 426) on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*.

4.3 Discrimination, a concept in search of unity; data protection, a fairly stabilised notion

In the field of EU anti-discrimination law one has to distinguish between legislation relating to discrimination on *specific* protected grounds (e.g. race, gender, disability or age) and the *general* principle of equal treatment. This general principle can be understood as rooted in the classic Aristotelian idea that similar situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. However, the conformity to this general principle, which follows from the constitutional traditions of the member states, international human right treaties, in particular the European Convention on Human Rights (ECHR), and since 2009 the EU Charter of Fundamental Rights (EUCFR), is only assessed by a marginal test: as long as a difference in treatment has *some* rationality to it and is not completely arbitrary, the quality of the underlying reasoning is not further assessed ('equality as rationality', McCrudden and Prechal 2009). This approach was recently restated in *Arcelor* (ECJ, C-127/07, 16 December 2008). Next to the general principle of equality, the European Union has also developed anti-discrimination law relating to *specific* grounds. In the following section (4.4) we will take a closer look at the scopes and particularities of the different Directives regarding specific forbidden grounds of discrimination, but first we have to point out that here, in contrast to the general principle of equality, a more conceptually refined notion of discrimination is presented, broken down into different types of discrimination.

A first important conceptual distinction is the one between direct and indirect discrimination, both of which are protected in all of the recent Directives. Direct discrimination occurs when a person is treated in a less favourable way than another person and this difference is based directly on a forbidden ground. For instance, the Race Equality (*RE*) Directive states that "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin" (art. 2(2a)). Indirect discrimination makes a conceptual shift from consistency to substance (Fredman 2002) by providing protection from apparently neutral provisions, criteria or practices which have the 'side effect' of discriminating against one of the specific forbidden grounds. Discrimination based on a neutral 'proxy' that disadvantages a

[5] For a comprehensive description of this evolution, see Bribosia (2008). When mentioning anti-discrimination legislation, we will designate any of the aforementioned directives, since their structure and their provisions are identical as far as our argument is concerned.

protected group[6] is thus prevented, "unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" (art. 2(2b) *RE*). Next to direct and indirect discrimination there is another form of discrimination, referred to as harassment: "when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment" (art. 2(3) *RE*). However, this definition is not uniform across the different anti-discrimination directives and is open to varying interpretations: "the concept of harassment may be defined in accordance with the national laws and practice of the Member States" (art. 2(3) *RE*).

As the previous analysis demonstrates, the legal concept of discrimination is multi-layered and sometimes contentious. Indeed, because it is a complex social phenomenon, the European legislator has tried to define it in the most precise possible manner in a series of legal instruments. However, this very precision may have jeopardized the unity (and consequent understanding) of the concept. That which is considered to be an instance of forbidden discrimination differs depending on which protected ground (e.g. race or age) is at stake: this varying conceptualization and protection is called the *asymmetrical scope* of EU anti-discrimination law.

In comparison, the object of data protection legislation (i.e., personal data) appears to be much clearer. In the EU legal order its definition can be traced back in the *Data Protection Directive*. According to the latter, a personal data is "*any information relating to an identified or identifiable natural person*",[7] whereas a processing of personal data can be defined as "*any operation or set of operations which is performed upon personal data*".[8] Hence, a processing of personal data must respect the several principles enshrined in the Directive. However, like any legal concept, the notion of personal data is not void of controversies.[9]

As will be further explored (*infra*, section 4.5), one possible explanation for the conceptual controversies surrounding anti-discrimination is that this legal regime deals with the qualification of a difference of treatment, and *not* with the specificities of the practice leading up to the discriminatory or non-discriminatory 'end result'. Thus anti-discrimination law is not tied to only one specific locus or field. A forbidden differential treatment can take many shapes and materialise itself in virtually any type of action, which is why anti-discrimination law is not limited to a certain kind of practice or behaviour: there are many roads that can lead to an instance of 'prohibited discrimination'. Moreover, anti-discrimination law is not one unified entity but a landscape filled with a variety of 'towns' and 'villages' of different size, shape and constitution. Data protection, on the contrary, is tied to one particular practice, namely the processing of personal data. Its focus is processual (it will prohibit the *process* of opaque handling of personal data without any legitimate aim, even if there are seemingly no direct adverse *effects*) and oriented towards one particular, clearly defined field.[10] Furthermore, one could object that in the case of

[6] For example, a disproportionate low salary for part-time work can be considered discriminatory against women if it's predominantly women who work part-time.
[7] Article 2(a).
[8] Article 2(b).
[9] Cf. *infra*, 4.5.

reverse discrimination, i.e. when a differential treatment of a protected group follows from a so-called 'affirmative' or 'positive' action (art. 5 *RE*) the focus is *not* on the end result but on the preceding actions: though there is no unfair result the preceding action can be qualified as 'discriminatory'. Following this line of thought *AD* seems to be engaged with the process rather than the result. However, one could also argue the opposite: that reverse discrimination confirms the focus of *AD* on the *end result*, as it focuses on the enhancement of *substantial* equality ("equality of results" on a group level, which is opposed to formal equality, that is, the "consistent treatment of likes" on an individual level). (Fredman 2002, p. 11). Yet it should be noted that, although the promotion of substantive equality (e.g. by positive action, proactive measures and the prohibition of indirect discrimination) slowly gains in importance (see e.g. Fredman 2009), formal equality is still the dominant approach in anti-discrimination law.

4.4 Differences in the scope of EU data protection and anti-discrimination legislation

The scope of data protection law is not as difficult to define as that of anti-discrimination law. In principle, the point of departure within the Data Protection (*DP*) Directive is that it applies to any "processing of personal data wholly or partly by automated means, and to the processing otherwise than by automated means of personal data which form part of a filing system or are intended to form part of a filing system" (art. 3(1)). There are two main exceptions to this general rule: firstly the scope of *DP* does not include "processing operations concerning public security, defence, State security [...] and the activities of the State in areas of criminal law" (art. 3(2)) [11], and secondly there is the so-called 'household exception,' which exempts any processing "by a natural person in the course of a purely personal or household activity" [12] (art 3(2)).

Why is data protection conceptually unified, while anti-discrimination law consists of a patchwork of legislative documents with asymmetrical protective scopes? As mentioned above (4.2), next to the general principle of equality, the EU has developed anti-discrimination laws relating to *specific* grounds. In the early days of the European Community such specialized anti-discrimination laws were not conceived as a fundamental rights in themselves, but as tools to facilitate mobility and the functioning of the internal market: combating discrimination among EU-citizens based on nationality (art. 18 *TFEU*) and gender in labour related matters were ways to enhance the efficiency of the common market and to prevent discrimination on grounds that are economically inefficient (More 1999). However, in the last decade the scope of anti-discrimination law has been broadened beyond mere economic considerations and the list of grounds for unlawful discrimination has been extended with the entry into force in 1999 of article 13 *TEC*[13] (Meenan 2007). This provision

[11] However, this is the very object of Council Framework Decision 2008/877/JHA of 27 November 2008. Furthermore, these processing operations are also encompassed by Council of Europe Convention 108 (1981), which is applicable in the legal order of every EU member state.

[12] A "purely personal or household activity" should be interpreted in a restrictive manner. See *Lindquist*, ECJ, C-101/01, 6 November 2003.

[13] The *Lisbon Treaty* (2009) has amended the *Treaty Establishing the European Community* (*TEC*, 1997) into the *Treaty on the Functioning of the Union* (*TFEU*, 2008), and consequently ex Article 13 *TEC* has become Article 19 of the *TFEU*.

has given rise to several new directives. As mentioned before (*supra,* 4.2), these directives have differing protective scopes, which we will now look at in more detail. Firstly, with regard to race, there is Directive 2000/43/EC (*Race Equality Directive*) which provides a very wide protection against discrimination based on race or ethnic origin: such discrimination is forbidden with regard to employment, occupation and vocational training, and the non-employment fields of social welfare (such as education, social security, health care) and access to goods and services, which includes housing. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, even extends this already wide scope. Secondly, with regard to gender, there are Directive 2006/54/EC[14], on equal treatment for men and women in the field of employment and occupation (*Gender Recast Directive*), and Directive 2004/113/EC prohibiting sex discrimination concerning access to and supply of goods and services (*Gender Goods and Services Directive*). It follows from these, and the earlier gender related Directives[15] from the first (1970s) and second wave (1990s), that the range of prohibited gender discrimination is narrower than that of racial discrimination, as it neither covers the areas of education, media and advertising (Directive 2004/113/EC, art. 3(3)), nor taxation and, in all likelihood, health care. Gender discrimination is not prohibited with regard to goods and services provided by public bodies that are not part of the common market (preamble of Directive 2004/113/EC, §11), and only covers social security – which is not as broad as the social welfare protected by racial anti-discrimination law (Fribergh and Kjaerum 2011). The difference in protective scope against racial and gender discrimination has been criticized (see e.g. Caracciolo di Torella 2005; Van Drooghenbroeck and Lemmens 2010). Finally, there is Directive 2000/78/EC (*Employment Equality Directive*), which prohibits discrimination on grounds of religion and belief, age, disability and sexual orientation, but only with regard to employment, occupation and vocational training.

It follows from the above that at present the scope of anti-discrimination legislation varies widely according to the protected grounds, even though the Proposal for a Council Directive of 2 July 2008 is meant to overcome some of the asymmetries by extending the prohibition of discrimination based on grounds of religious, disability, age or sexual orientation beyond labour market issues (see for a critical discussion: Van Drooghenbroeck and Lemmens 2010).

4.5 A Legal Regime comprising both an administrative structure and a bundle of subjective rights

This section will give a closer look at the Legal Regime of the two rights. A common feature of the two types of legal regimes is that they do not merely consist of legal principles, but they also contain administrative bodies and a series of so-called 'subjective' rights: concrete, individual rights granted to the legal subjects they aim to protect, which can be mobilised at will (Dabin 1952).

[14] This directive actualises Directive 2002/73/EC.

[15] Most of the earlier directives on gender, which were introduced in the 1970s and 1990s, have been superseded by the *Gender Recast Directive*, but for instance, Directive 79/7/EEC, the *Gender Social Security Directive*, and Directive 92/85/EEC, the *Pregnancy Directive*, are still in force and binding the member states.

Both the EU data protection and anti-discrimination frameworks rely upon the existence of supervisory bodies: Data Protection Authorities (DPAs) and Equality bodies.

Data Protection Authorities are independent supervisory authorities that have several, sometimes different, powers and responsibilities (depending on the national legislations implementing the Data Protection Directive). Thus, apart from keeping a processing register, they can offer advice, investigate issues, handle complaints, take a certain number of decisions concerning determinate data processing operations, provide authorisations, take a case to court, or even institute binding rules/regulations (Gutwirth 2002, p. 93). This does not mean however that judicial processes are totally absent from data protection law: member states are obliged to ensure the existence of judicial remedies that can grant compensation to data subjects (art. 23 *DP*).

Equality bodies have similar powers and responsibilities as they must provide independent assistance to victims of discrimination in pursuing their complaints before the Courts, conduct independent surveys concerning discrimination, publish independent reports and make recommendations on any issue relating to discrimination (art. 13(2) *RE*). Also, depending on the countries, their powers will often include competences to provide advice, or handle complaints in the framework of alternative dispute settlement mechanisms (see e.g. De Hert and Ahiagbor (eds) 2011).[16]

It is interesting to note that the differences between the supervisory bodies are only marginal, which is not the case for the subjective rights featured by the two rights (cf. herein below).

As far as data protection is concerned, data subjects have the right to be informed that their data is being used in a processing operation (art. 10 and 11 *Data Protection (DP) Directive 95/46/EC*). They also have the right to access their data when these have been processed, e.g., they can investigate how the processing operation is carried out, whether databases exist, what their purpose is, and who is responsible for the processing (art. 12(a) *DP*; (Gutwirth 2002, p. 102). Furthermore, in case the data appear to be incomplete, inaccurate, or processed in a manner that is incompatible with the other data protection principles, the data subject has the right to ask for the rectification, or even the erasure of his data (art. 12(b) *DP*;(Gutwirth 2002, p. 102). Data subjects are also entitled to object to the processing of their personal data provided there are "compelling legitimate grounds" (art. 14(a) *DP*). Finally, data subjects have the right "not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data" (art. 15 *DP*), which means that important decisions concerning them cannot be taken solely on the automated processing of data, and that they have a right to actively participate in those very decisions (Gutwirth 2002, p. 104).

Anti-discrimination legislation also warrants individual rights to the subjects they aim to protect. Those rights are mostly intended to guarantee access to justice that is as efficient as possible (Fredman 2009). In this respect, some provisions aim at

[16] Also, on the role of the Article 29 Working Party, see Poullet and Gutwirth (2008).

improving the ability of "discrimination subjects" to defend their rights, since they foresee that "Member States shall ensure that judicial and/or administrative procedures (…) are available to all persons who consider themselves victims of discrimination". Also, associations that have a legitimate interest can help discrimination subjects to file a complaint, or even act on their behalf (art. 7(2) of *Race Equality Directive (RE) 2000/43/EC*). In order to enhance the chances of success of an action any contract, or provision of a contract, which is discriminatory can automatically be declared null and void by a judge (art. 14 *RE*); alleged victims benefit from a reversal of the burden of proof provided there are sufficient presumptions (i.e., according to art. 8 *RE*, it is up to the respondent to prove that there has been no discrimination), and they are also entitled to an effective, proportionate and dissuasive remedy (art. 15 *RE*). Victims of discrimination are also guaranteed the right to be protected against retaliation in case of a successful procedure (art. 9 *RE*). For an example at the national level, Belgium has implemented this requirement by setting up a special procedure called *action en cessation* (action for injunction), which guarantees victims that their case will be swiftly examined (6 months), and that they will automatically receive a lump sum, if discrimination is proven (Closset-Marchal, Van Drooghenbroeck 2008: 363).[17]

When taking a closer look at what *kind* of subjective rights each of these two regimes contain, some interesting contrasts come to the fore. The rights granted by data protection, such as the right to access one's own data, are very concrete actions that each data subject can undertake in an autonomous way (even though in practice only a limited amount of data subjects bother or manage to mobilise them). In comparison, what we have qualified as subjective rights in the field of anti-discrimination legislation does not refer to fully-fledged subjective rights, but rather to guarantees which aim to facilitate successful actions before courts, thereby ensuring a real efficiency to anti-discrimination principles. Thus it would not seem unfair to argue that data protection rights correspond closer to the notion of subjective rights: it could be argued that the data subject's rights are part of the very essence of data protection, i.e. that data protection is about granting prerogatives to the person whose personal information is being processed, whereas in the case of anti-discrimination the prerogatives merely represent an ancillary tool in order to ensure the efficiency of the legal framework.

In order to make sense out of this distinction, one has to take into account the *object* of each of these legal regimes Data protection is fundamentally different from anti-discrimination law, in that it regulates one[18] kind of action (the processing of personal data), independently of its actual consequences.[19] By contrast, anti-discrimination

[17] See also, Belgian Equality Act, art. 20(1); Belgian Gender Discrimination Act, art. 25(1); Belgian Anti-Racism Act, art. 18(1).

[18] There are two exceptions (art. 3(2) *DP*): data processed in the context of the household or criminal law enforcement do not fall under the scope of the *DP* Directive. See *supra*, section 4.3.

[19] One should, however, distinguish between the *actual consequences* and the *aim* of the data processing *as inscribed in the process* of data handling. According to the *DP* Directive the latter is of great importance in assessing the overall legitimacy of the processing of data. Thus, data protection does not look into the actual outcomes of data processing, but it does assess whether the reasons and interests (art. 7(f) *DP*) for a particular instance of data processing were legitimate, Of course, in practice this conceptual distinction might turn out to be permeable. See *infra* , section 4.7.

legislation concerns one[20] determinate legal consequence (a breach of equality between citizens), no matter what action it stems from. Data protection is, from this particular point of view, less contentious than anti-discrimination. Indeed, data protection is about one particular operation (the processing of personal data), the status of which is unproblematic.[21] Discrimination goes a step further because it already operates a qualification of the effect on an action, and not merely the process itself. While the question of what qualifies as data processing might have some of its own legal intricacies, clearly, the question as to what counts as an unwarranted discriminatory action is a more contentious one (cf. *supra,* 4.3 and 4.5). Asking the latter question automatically entails operating a legal qualification of facts.
It could thus be argued that in data protection, data subjects are more empowered (and hence more autonomous) because of the inherently less contentious nature of the type of actions they are concerned with. In contrast, making an appeal to anti-discrimination law requires the intervention of a third party endowed with the legitimacy to undertake the legal hermeneutics to decide about the discriminatory nature of the consequences of the contested action. Hence, the level of contentiousness, which is higher in anti-discrimination than in data protection, could explain why subjective rights are ancillary in the former and substantial in the latter.

However, the difference between the two sets of subjective rights may not be as fundamental as it appears. A historical analysis of anti-discrimination legislation could lead us to mitigate an overly essentialist understanding of the divide and show the historical contingencies which gave rise to it.

To the extent that data protection can be traced back, be it in the OECD data protection guidelines (1980), the Council of Europe Convention 108 (1981), or the UN Guidelines concerning Computerized Personal Data Files (1990), it has always existed as a set of 'Fair Information Practices'.[22] This is hardly the case for anti-discrimination legislation, since it has not always featured such procedural characteristics (including both subjective rights and supervisory administrative structures). Indeed, much has been written on the changing approaches to the fight against discrimination (Fredman 2005, 2006) (Bribosia 2008). The first approach, which can be qualified as an *ex post* (or post active) approach, consists in prohibiting discriminations whilst correlatively foreseeing a judicial sanction aimed at enforcing this ban. This is the classical human rights approach, which is still applicable to the other fundamental freedoms (except precisely for data protection, see also (Fredman 2006, p. 41). For a wide range of reasons, this approach has not been as successful in the case of discrimination as with other fundamental rights (Ringelheim 2010, p. 163; Fredman 2005, p. 372; 2009). Pursuant to these mitigated results, the EU has decided to complement the first approach with an *ex ante* (or proactive) approach[23], leading to the adoption of new principles and mechanisms, i.e., the so-called mainstreaming

[20] This needs to be mitigated, however, given the varying scopes of the different directives. See *supra*, section 4.4.
[21] However, there are some controversies on the definition of personal data. See, Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data.
[22] Some authors disagree on this point. For instance, Mayer-Schönberger (2001) argues that the content of Data Protection legislation has undergone major evolutions.
[23] This move has not only been undertaken at EU level; see also, e.g., the UN Convention on the rights of people with disabilities (2006).

approach,[24] and the different administrative procedures and mechanisms. Rather than fighting discrimination by repression, i.e. by imposing a judicial sanction upon infringements, the ultimate goal of the new preventive or proactive approach is to put an end to systemic factors of discrimination; therefore creating the necessary conditions whereby it is no longer possible for discriminating practices to exist (Fredman 2009, p. 3). Hence, the need for policies that tackle the root factors of discrimination and for a binding decentralised administrative system that guarantees the equality between citizens in a quasi-automatic manner. The current EU anti-discrimination legal framework is therefore composed of policies that promote equality within society on the one hand (mainstreaming), and on the other hand, of a set of procedural mechanisms that strive for the immediate stop of discriminatory behaviour, *inter alia*, by empowering discrimination subjects and by relying upon a supervisory body. (See Gellert, De Hert, 2012).[25]

Understanding the logic at work in the evolution of anti-discrimination legislation leads us to support the affirmation that the current differences between the two legislations are not a fatality, and they could be mitigated in the future.[26] It is thus not excluded that future developments of anti-discrimination legislation will feature new types of subjective rights that are fully-fledged, and not simply ancillary. Such a stance is supported by the fact that in both cases supervisory bodies have been granted similar powers.
Furthermore, the convergence between the two rights can also be observed from the reversed perspective. As far as data protection is concerned, it seems that the recent legislative focus has been put upon the enforcement of the legislative framework. So whereas anti-discrimination appears to be going in the direction of more subjective rights, data protection appears to emphasise the need for enforcement procedures.[27] This stance seems to be confirmed by the draft Regulation on Data Protection, as leaked in November 2011, which includes provisions for the accountability of the data controllers, provisions strengthening the powers of the supervisory bodies. Its chapter dedicated to remedies, liability and sanctions, contains an article on judicial assistance that is similar to what is provided by anti-discrimination legislation (art. 73).[28]

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[24] According to the EU, mainstreaming can be defined as "*a social justice-led approach to policy making in which equal opportunities principles, strategies and practices are integrated into the every day work of government and public bodies"*, available on the following website, http://ec.europa.eu/social/main.jsp?catId=421&langId=fr.

[25] It seems to us that data protection and anti-discrimination share the awareness that part of the solutions lie in changing the very structures. In the case of anti-discrimination, it concerns social structures, and it is achieved through policies of mainstreaming, whereas in the case of anti-discrimination it concerns technical structures and is achieved through design (e.g., privacy by design).

[26] According to De Hert and Ashiagbor (eds.)(2011), equality bodies devote an important part of their workload into activities of counselling to discrimination victims, and/or into dispute settlement, thereby importantly reducing the role of traditional courts and tribunals in matter of discrimination.

[27] See Article 29 Working Party Joint contribution to the Consultation of the European Commission on the legal framework for the fundamental right to protection of personal data, WP 169 adopted on 01 December 2009, or Opinion 3/2010 on the principle of accountability, WP 173 adopted on 13 July 2010.

[28] Also, on a national perspective again, the Belgian Act for the protection of personal data contains a provision setting up a specific judicial procedure similar to the one concerning anti-discrimination. However, no use has ever been made of it. See, Belgian Act on the protection of privacy regarding the processing of personal data, article 14.

In conclusion it may be said that data protection and anti-discrimination legislation increasingly turn to the same mode of operation, though the comparison is not symmetrical, due to reasons stemming from the different characteristics of the two rights at stake. In the next section, we will therefore argue that this similarity in the legal regimes of the two rights can be explained by their common nature, which we will qualify as being regulatory.

4.6 Data Protection and anti-discrimination: two regulatory human rights

In order to better understand the proposition according to which data protection and anti-discrimination are human rights of a regulatory nature, it is necessary to turn to the broader framework within which (all) human rights operate: the democratic constitutional State. Contrary to political systems characterised by an authoritarian ruler, the very aim of democratic regimes is to guarantee personal freedom and self-determination while at the same time preserving order. This regime is thus in constant tension, as it has to preserve simultaneously two antagonistic values - individual liberty *and* order (Gutwirth 1998; De Hert and Gutwirth 2008).

In order to realize this objective, democratic constitutional states have created a political structure wherein power is limited and non absolute, and which resorts to a double constitutional architecture. On the one hand, fundamental freedoms empower citizens with a set of individual rights that limit and counterbalance the power of the state. It is crucial to understand that human rights protect individuals from the State insofar as they create a sphere of autonomy or self-determination. On the other hand, the power of the State is subject to a set of constitutional rules holding the government to its own rules and to a system of mutual checks and balances. Furthermore, governments will be legitimate if and only if they can be considered as an expression of the "will of the people" (i.e., representation through elections) (De Hert and Gutwirth 2006).

Such architecture is thus not only based upon the assumption that citizens are "indigenous" (they were already "there" before the state) and autonomous political actors, but it also constitutionally enforces it. By shielding individuals from abuses of power through human rights, and by controlling this power with checks and balances, transparency and accountability, this architecture has contributed to the constitutional creation of the political *private* sphere. By comparison, the political *public* sphere is the political space where government and State intervention are legitimate (Gutwirth 1998; De Hert and Gutwirth 2006). In other words, the political private sphere is the political space wherein individuals can exercise their liberty/self-determination. Moreover, it can be argued that each different human right is the legal materialisation (or translation) of a given aspect of the political private sphere.

So far, we have purported that the project of the democratic constitutional state is built upon the idea of individual liberty, and it is to this end that it has instituted a so-called "political private sphere", which is the *locus* of political liberty, and which is shielded by human rights. The whole spectrum of human rights is mobilised for the protection of the political private sphere, including such different rights as the

prohibition of torture, freedom of assembly, or data protection (assuming it is a fundamental right, which we do), or and anti-discrimination.

Since liberty seems to be at the core of the *raison d'être* of human rights, it seems to us that exploring different meanings and conceptions of liberty might give us some indications as to the mode of operation of the two legal regimes that we have evidenced *supra*, in section 4.5.

In this respect, the seminal work of Berlin appears as crucial. In his essay on the two concepts of liberty (1969), Berlin makes the distinction between "positive" and "negative" freedom.
Negative freedom answers to the question "What is the area within which the subject is or should be left to do or be, without interference by other persons?" (p. 121-122). Negative freedom is thus the freedom not to be interfered with by others (p. 123), that is, ultimately, "freedom from" (p. 131).
Positive freedom, on the contrary, "derives from the wish on the part of the individual to be his own master" (p. 131), or "freedom as self-mastery" (p. 134). Ultimately, this is a *freedom to* (to lead one's preferred way of life) (p. 131).

Accordingly, negative freedom is about the determination of the boundaries of individual freedom, whereas positive freedom is about the substantiation of this very freedom. This entails that negative freedom needs to take into account the behaviour of others, since the subject must be free from them in his area of freedom that has been deemed as legitimate. However, freedom in the positive sense is not concerned about the actions of others, but solely with that of the individual, as it is concerned with the "empowerment" of the latter.

Keeping in mind that human rights are the legal translation of the political private sphere of individual liberty, the foregoing dichotomy between negative and positive freedom can be of use as far as human rights are concerned. Indeed, it seems to us that a distinction can be made between human rights that literally empower the subject by granting him/her a prerogative (such as freedom of assembly, freedom of opinion, which Berlin refers to as a "catalogue of individual liberties", p. 126), and human rights that aim precisely at guaranteeing this "catalogue of individual liberties" against the deeds of others, be it other subjects, or the state.

That is the reason why we consider it relevant to introduce the distinction between **substantial** and **regulatory** rights. From this perspective, substantial human rights empower the subject by granting him/her one of the individual liberties that constitute freedom in its positive sense, that is, centred around the (possibilities of) actions of the individual. Hence, they are about the substance, the content of one's freedom. Regulatory human rights on the other hand, embody the logic of negative freedom and hence aim at regulating, channeling the actions of others, so as to make sure they don't infringe upon, and consequently respect, the freedom of the subject.[29] We are of

[29] Of course it might be argued that other rights *do also have ex ante measures*. For instance, in the case of freedom of speech and expression, there exists some regulations that ensure that the channels of expression are open, that guarantee the plurality of political ideas on the media, or that protect the sources of journalists. However, according to us the two issues do not proceed from the same logic and thus need to be distinguished. In the first case we are confronted with human rights that correspond to the logic embodied by negative freedom, and thus the very aim of the latter is to guarantee the freedom

the opinion that such is the case for the rights to data protection and anti-discrimination. In both cases their very aim consists in making sure that the actions of others remain within boundaries that prevent them from infringing upon the freedom of their fellow subjects (one by regulating all data processing operations, the other by making sure that all actions respect the core principle of equality among citizens).

Consequently, the Legal Regime of these rights should reflect their nature as regulatory human rights. Is this the case? As announced at the end of the precedent section, we believe that similar traits in both regimes we have evidenced (cf. the bundle of subjective rights and the supervisory bodies) are characteristic of this regulatory nature. By granting a bundle of subjective rights and relying upon (administrative) supervisory bodies, they strive towards a proactive judicial approach that aims less at sanctioning the violation of a right than at preventing this violation from taking place. In doing so, they thus channel, regulate, the actions of others (precisely through the two means we have evidenced: subjective rights and supervisory bodies).

However, although data protection and anti-discrimination are both about the channelling of the deeds of others, they do so departing from two different perspectives: whereas data protection focuses on one particular action, anti-discrimination solely envisages a specific legal outcome (cf. *supra*, 4.3 and 4.5). One might then ask the question as to whether the possibility exists that these two perspectives coincide. In other words, whether there are potential overlaps between the two rights, that is, whether the protection offered by the two rights might apply to one very same action.

This will be the topic of the next section where we will examine the potentialities of overlap.

4.7 Overlaps: at the crossroad between data protection and anti-discrimination

In this section we will examine the possibilities of overlap between data protection and anti-discrimination through the lens of two cases. Both deal with the inclusion of citizens in databases and the ensuing violation of rights.
What does this mean in practice? When we have a database in which personal data are processed there are two ways in which this data base can give rise to a differential treatment: either the difference is made between those who are included and those who are excluded (*inter*), or the differentiation is made within the database (*intra*). For instance, an insurance company can decide that all the persons in a certain

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of the subject regarding the actions of others. Their primary aim is to make the individual **free from**. In the second case we are facing measures that are encompassed by what is known in human rights theory as positive obligations. Positive obligations theory aims at guaranteeing that third parties do not violate a given substantial human right (freedom of expression in our example), and thus aim at guaranteeing the enjoyment of the right by its legitimate holder. Enjoying one's right indeed entails to some extent to be free from these actions that will violate the right in question, and in that sense positive obligations can be related to the logic underpinning negative freedom, since, ultimately, one needs to be "free from" in order to be "free to". However this doesn't affect the validity of our analysis, according to which it is clearly possible to differentiate two types of human rights. This distinction is not merely theoretical. For practical implications, see supra, 4.5 and infra, 4.7 on how to simultaneously protect negative freedom from several perspectives.

database have to pay 50% higher fees compared to those who are not (*inter*), or differentiate within (*intra*) a database by deciding that all persons with attribute X pay 50% more than those with attribute Y. To further explore these two situations we look at two recent decisions made by the ECJ: *Huber v. Germany* (2008), regarding a disadvantageous inclusion in a database, and *Test-Achats v. Council* (2011), regarding the gendered differentiation of insurance fees based on statistical profiling.

a. Huber v. Germany (2008): disadvantageous inclusion in a database

There are many instances when one's presence in a database is disadvantageous[30] compared to those who are not included (see e.g. González Fuster et al. 2010). This was the case in *Huber* (ECJ, 2008).[31] Clearly, the inclusion in the German Register of Foreign Nationals (AZR) is disadvantageous as it increases the likelihood of being suspected, falsely or correctly, of criminal activities. Hence, the lawfulness of such inclusion in a database is dubious. Of interest to us, it can be approached from both a *DP* and an *AD* perspective.

From the point of view of data protection the pivotal question is whether the processing of one's data in a particular database is legitimate. Is there a reason that legitimizes one's presence in the database? Article 7 of the *DP* Directive gives several reasons that could make data processing legitimate, the most important[32] one being Article 7(f): when it is "necessary for the purposes of the **legitimate interests** pursued by the controller".[33] Thus, the data protection perspective looks at the legitimacy of one's presence in the database *in itself*.

Contrary to data protection, anti-discrimination would take a *comparative* point of view: it looks at the difference in treatment between those who are included in the database and those who are not. Data protection asks: is the goal for which the data are being processed legitimate? Anti-discrimination asks: is the difference in treatment legitimized by a related and proportionate difference in the respective situations?

The interesting move in *Huber* (2008) is that it the ECJ interconnects these two legal regimes. The 'magical' words that link them together are *necessity* and *proportionality*. With regard to data protection, *necessity* is embodied in the *purpose specification principle*, which requires that data must be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes" (art. 6(b) *DP*), and *proportionality* is embodied in the *data quality principle*, which requires, *inter alia*, that the data must be "adequate, relevant and not

[30] Not every inclusion in a database is necessarily disadvantageous – it might also clear a person in some cases. See further on this issue *infra*, our discussion in section 4.8..

[31] Cf, *supra*, 4.1. There are other examples such as the *Marper* case (ECtHR, 4 December 2008), where it was contested that the DNA sample of any arrested individual in the UK was stored for an indefinite period of time in the National DNA Database, even if the individual was acquitted or never charged

[32] Contrary to what is often argued, we do not believe that the consent criterion of Article 7(a) *DP* is the most important. Since art. 7(e) and (f) do already justify any processing of personal data tending to the realisation of a legitimate aim of the data controller, the legitimacy by consent criterion foreseen by art. 7(a) will often, if not always, be superfluous. If the consent criterion could supersede the other "legitimate aims" criteria this would perversely imply that consent could legitimize processing for "illegitimate aims", which would be an unacceptable outcome.

[33] We underline. In *Huber*, the article at stake was Article 7(e), which is a sub category of article 7(f), as it states that data may be processed if the "processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed".

excessive in relation to the purposes for which they are collected and/or further processed" (art. 6(c) *DP*). This entails that even when the aims of an instance of data processing are legitimate according to art. 7, this particular instance will only effectively be fully legitimate if the data collected and the way they are processed are in line with the requirements of art. 6 *DP*. In other words, a processing of data will be lawful if it is legitimate (according to article 7). However, this same processing would lose its legitimacy if it were not, *additionally*, necessary and proportional to the aim pursed (Gutwirth 2002).

Thus, in *Huber* it is not disputed that the processing of data of foreign residents serves objectives of public interest – applying the laws of residence and producing population statistics, but it is questioned whether these acts of processing are proportionate to the pursued objectives. In a move that is not uncontested, the Court engages the *necessity/proportionality* discussion only on the basis of art. 7, without any additional reference to art. 6. As a result, the Court links art. 7(e) of the Data Protection Directive to the prohibition of anti-discrimination based on nationality (the former art. 12(1) TEC), by interpreting the former *in the light* of the latter (section 66 of the *Huber* judgment). Keeping a register like the AZR purely for the purpose of population statistics would be disproportionate, because anonymous data would serve that purpose equally well (section 65 and 68), and processing non-anonymised data for the purpose of population statistics is thus both unnecessary, in the meaning of *DP*, and discriminatory, in the sense of art. 12(1) TEC.

Surprisingly when anti-discrimination considerations (section 75) are applied independently of data protection considerations[34], a comparable proportionality test seems to be implied. The question of proportionality is not explored, because the fight against crime "in the general sense" (section 78) is, unlike the application of the right of residence for foreigners, not something that is only related to foreigners. Nevertheless one could cautiously argue that the prohibition of arbitrariness derived from anti-discrimination law can encompass a proportionality test: disproportionate differences in treatment, based on a protected ground like nationality, qualify as arbitrary discriminations. Only if there is a legitimate, proportionate objective for distinguishing among German citizens and citizens of other member states, discrimination on grounds of nationality can be allowed. Advocate General Maduro seem to go along those line when he states that the obvious fact that there is of course a difference between German citizens and non-German Union citizens, does not allow for any discrimination whatsoever, because "the difference in treatment must relate and be proportionate to the difference in [...] situations".

Concluding, we see in the *Huber* case that both data protection and anti-discrimination have the possibility to address a difference of treatment following from the disadvantageous inclusion in a database. In *DP* differential treatment is approached through the question of legitimacy, which entails proportionality, which in turn prohibits disproportionate difference in treatment. However, in the case of *DP* the question of disproportional differential treatment is only *one* of the criteria that will help determining whether a given instance of data processing is proportional, and hence legitimate (and lawful) or not. Therefore the '*bite*' of *DP* with regard to

[34] In assessing the legitimacy of the secondary use of AZR data for *purposes of criminal investigation*, the Court cannot ground it's decision on the *DP* directive because any data related to the enforcement of criminal law are excluded from its scope (art. 3(2) *DP*). See *supra*, section 4.4.

infringements will be comparatively small to the more direct approach of *AD*, to which the difference of treatment is the core concern.

Yet a drawback of the *AD* approach is that it only concerns a limited set of protected grounds. In the *Huber* case the disproportionate differentiation was viewed through the lens of an *AD* provision, prohibiting discrimination on one particular forbidden ground (i.e., nationality). However, one could also imagine that the Court, were it to be confronted with a similar case wherein the differential treatment *did not* concern one of the grounds protected by *AD*, could link the provisions from art. 6 and 7 *DP* to the *general* principle of equal treatment. Even though such proportionality assessment would be marginal and lenient -especially in comparison with the protection granted by the *AD* on protected grounds!- (cf. previous paragraph), the "art. 6 *DP* + general equality" approach could be a useful tool to supplement any too strict limitations in the scope of *AD*.

b. Test-Achats v. Council (2011), discrimination based on statistical profiling

A second situation of possible overlap between *DP* and *AD* in the field of data mining and profiling can occur when a differentiation is made within a database, resulting from an analysis of the data. Often such analysis will involve statistical profiling. At present many cases in this vein take place in the field of insurance. In such instances (De Hert et al. 2007) data protection may give the data subject certain subjective rights (cf., *supra* 4.4). However, it is contested whether the use of data that are not derived from the data subject but that are applied to him or her, can be considered as personal data as defined within the Data Protection Directive. In *Opinion 4/2007*, the Article 29 Working Party[35] (*WP* 29) has answered this question affirmatively:

> "Also a purpose element can be responsible for the fact that information 'relates' to a certain person. That purpose element can be considered to exist when the data are used or are likely to be used, taking into account all the circumstances surrounding the precise case, with the purpose to evaluate, treat in a certain way or influence the status or behavior of an individual".

When a statistical profile functions as the basis for unequal treatment of similar cases, considerations of anti-discrimination can also play a role (Gandy 2008, 2009). The fact that a differentiation in treatment is not arbitrary but based on reliable statistics does not necessarily exclude it from the category of prohibited discriminations (Rüegger 2007). In *Lindorfer* (ECJ, C-227/04, 11 September 2007) Advocate-General Sharpston stated:

> "[i]n order to see such discrimination [based on sex] in perspective, it might be helpful to imagine a situation in which (as is perfectly plausible) statistics might show that a member of one ethnic group lived on average longer than those of another. To take those differences into account when determining the correlation between contributions and entitlements under the Community pension scheme would be wholly unacceptable, and I cannot see that the use of the criterion of sex rather than ethnic origin can be more acceptable."

Recently, the ECJ addressed this kind of discrimination in *Test-Achats* (ECJ, C-236/09, 1 March 2011), wherein the Belgian consumer organisation contested the validity of art. 5(2) of the *Gender Goods and Services Directive*. Whereas art. 5(1)

[35] The Opinions of WP 29 are not binding. If the issue ever became the matter of dispute in a real case, the court could interpret the notion of personal data differently.

prohibits "the use of sex as a factor in the calculation of […] individuals' premium and benefits", article 5(2) permitted member states to create legal provisions derogating this prohibition when sex is a "determining factor" and when the risk assessment is "based on relevant and accurate actuarial and statistical data." The ECJ declared the derogation of article 5(2) incompatible with gender equality and invalid with effect from 21 December 2012. The decision caused an enormous stir in the insurance sector. Possibly the decision will lead to the use of proxy factors (such as profession, education, lifestyle, etc.) in assessing risk, which in turn might raise questions of indirect discrimination.

Though interesting, investigating these issues in more detail is beyond the scope of this chapter. However, what is relevant for us to note here is that in the *Test-Achats* case the proceedings were completely based on anti-discrimination law, and do not relate to data protection at all. This can be explained by the facts that the claimant was a consumer organisation and not an individual data subject, and that the case did not concern an individual instance of differential treatment but posed a direct challenge to a piece of *AD* legislation. Looking at the *Test-Achats* case it is interesting to speculate whether the data processing related to the gendered differentiation of insurance fees, had it been contested, would have been considered legitimate from a data protection perspective. First, it is not even sure that DP can apply to this type of situation as the opinion of the *WP29* is not uncontested and not binding in any case. Second, provided this insurance contract can be considered as a legitimate aim to be pursued (art. 7), this would depend on whether such processing is necessary to the performance of the insurance contract (art. 6 *DP*).

Would the applicability of *DP* be of any help? Often statistical discrimination will not concern any of the protected grounds, rather, attributes such as income, postal code, browsing behaviour, type of car, etc., or complex algorithmic combinations of several attributes. *AD* could be eventually be resorted to if it could be shown that any of these attributes, or algorithmic combinations of these attributes, were used as proxies for any protected ground (indirect discrimination). However, were this is not to be the case then, once more, the "art. 6 *DP* + general equality"-route could prove to be a useful tool to supplement the limitative list of protected grounds in *AD*.

c. Overlaps between DP and AD: many questions left to answer

It would also be interesting to compare the proportionality test in *DP* with the one in *AD* law, but at the moment there is too little case law to say anything conclusive about it. Moreover, because of the scattered scope of *AD* law it will be difficult to say whether these considerations are applicable to *AD* law in general, or relate to a specific field, such as nationality based discrimination in *Huber*.
With regard to statistical profiling we can conclude that both data protection and anti-discrimination are struggling to address some of the challenges raised by the spread of this data technique. In the context of data protection, discussions are particularly circled around whether the application of anonymized data to an identifiable person falls within the scope of the Directive.[36] In the context of anti-discrimination,

[36] And around the right to access the data and the logic involved in statistical profiling (art. 12 *DP*), and the right not to be subjected to a decision based solely on automated processing (art. 15(1) *DP*). However, this is beyond the scope of our discussion.

statistical profiling raised the question as to whether the fact that data are accurate and up-to-date exonerates the prohibition of discrimination. Statistical profiling also poses the question whether attributes, and complex algorithmic combinations of attributes, which do *not* belong to any of the specifically protected grounds might bring the concept of indirect discrimination and the "art. 6 *DP* + general equality"-route more to the frontline (and as a matter of fact, any difference of treatment that is not based upon the protected grounds).

4.8 Conclusions: articulating the two rights

In the preceding pages, we have attempted to compare data protection and anti-discrimination legislations in the EU legal order.

Beyond differences relating to their respective scope and object, we have observed an increasing convergence in their Legal Regimes. This convergence we have argued, can be better understood by tracing back their theoretical underpinnings, and more precisely their nature as human rights embodying the logic of negative freedom as put forth by Berlin, that is, as regulatory human rights.

Because both rights protect the freedom of the individual from the same perspective, it is not excluded that this protection might overlap, as has been shown with the Huber and *Test Achat* cases.

Because both rights have overlapped, and will probably increasingly continue to do so in the future, especially in the light of practices such as statistical profiling, it might be interesting to give some thoughts on **how to best articulate** rights that are bound to interact more and more in the future.

As a matter of fact, we would like to make the point that the protection offered by these two rights is complementary. Hence it is very unlikely that their articulation would lead to clashes or antagonistic results, although some have made the point that this could be the case. In his article, Strahilevitz (2008) argues that having one's data publicly available in a database is actually advantageous and "will reduce the prevalence of distasteful statistical discrimination." (p. 364). Illegitimate, distasteful discrimination is here understood as a heuristic used in situations where proper information is lacking (e.g. an employer uses skin colour as a proxy for criminal records – however, when these records would be publicly available the employer would not be forced to take recourse to racist heuristics.) In other words, the more information a person knows the more enlightened his/her choices will be, and thus the chances of undertaking a decision that bears discriminatory consequences will be the lowest possible.

Such a position can probably be traced back to the views developed by Posner in his seminal article *The Right of Privacy* (Posner 1978), which argues that the efficiency of economic transactions is enhanced by full disclosure of all available information in order to avoid distasteful discrimination. When information is concealed through privacy rights we are more likely to make the 'wrong' choices: e.g. hire an employee who is an ex-convict or has a serious health problem. One could therefore argue for full disclosure of as much information as possible.

This argument is, according to us, flawed. It sets the debate in the wrong terms, as it seems to leave the choice between either total transparency, or either total privacy. At this point it seems useful to remind that in the EU legal order data protection and

privacy are two different rights, though very much interrelated. Whereas the latter is about the intimacy of the individual and his/her self-determination (Gellert, Gutwirth 2012, Gutwirth 2002), the former has to do with the fairness, transparency and legitimacy of the processing of personal data. By default, data protection allows for the processing of personal data, but only at certain conditions. These conditions have been explained in the previous section: in addition to pursuing a legitimate aim, the processing must be necessary and proportional to this aim. Therefore, the point is more about determining the necessity and the proportionality of a processing in view of the legitimate aim that consists in taking a decision that bears no discriminatory consequences. In this respect one could eventually argue that the clash between the two rights could shift from "privacy vs transparency" to a clash between two conceptions of necessity and proportionality: a *DP* conception and an *AD* conception. However, this possibility seems highly theoretical and improbable to us, not least because we have shown in the *Huber* case that in order to determine the necessity of a processing, data protection takes anti-discrimination issues into consideration. Therefore, it is difficult for us to see how the rights would clash. On the contrary, it seems to us, that the protection they afford to the individual is complementary: if the protection afforded by one right is not sufficient, the individual can still seek for a protection from the perspective of the other right. This could be the case in the future for discriminations stemming from statistical profiling and thus based on no grounds protected by anti-discrimination: in these cases, the discrimination could still be tackled from the "art. 6 *DP* + general equality"-route.

All in all, this necessary complementarity between the two rights stems from their shared nature as regulatory human rights. As such, they are each the materialisation of a specific aspect of negative freedom. Therefore, they protect different dimensions of this negative freedom, and that is the reason why their combination will lead to a protection of negative freedom that is as comprehensible as possible.

Given that the protection of the individual will benefit from the complementarity of *DP* and *AD*, it might be interesting to think about the skilful use that can be made of the specificities of each Legal Regime. As noted in *supra*, 4.5, *DP* features a bundle of fully-fledged subjective rights, whereas *AD* puts the emphasis on the efficiency of the judicial framework. Therefore, in seeking the best possible protection the individual could follow a two-step approach whereby he/she would first use *DP* to ask for access to, and erasure of the data, and in case the result is not satisfying, then going to court with the aid of the subjective rights granted by *AD*.

Recent developments of data processing practices such as automated decision-making in databases lead us to think that issues of discrimination will increasingly come to the fore. It is therefore crucial to have a good understanding of the way in which both data protection and anti-discrimination operate, so as to grant the best possible protection to the individual. The foregoing lay some first elements of reflexion. However, this is a work that needs to be further continued.

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