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# Insurance for HIV-infected People and Equality Law

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**Abstract:** This article deals with the impact of Equal Treatment Law on the insurance of risks related to an HIV positive person from a European and German perspective. As will be shown, the infection is to be qualified as a disability but differentiations in insurance contracts are usually justifiable. In addition normally there is no unlawful treatment with regard to sexual identity. Even so the insurer has several options to avoid any conflict with HIV positive persons and thus establish and foster customer relations.

**JEL Classifications:** K12, K32, I13, I14

**Keywords:** Insurance; HIV infection; Disability; European Directives; Germany

## 1. Introduction

This contribution examines the influence equality law exercises on insurance for people with HIV. The article is based on the legal situation in Germany. However the legal questions are quite similar in other jurisdictions, especially with regard to the notion of disability. In Germany since the enactment of the Equal Treatment Act on 18/08/2006 any differentiation based on age, gender, disability or sexual identity in insurance contracts needs a justification, whereas distinctions with regard to "race" or ethnic origin and in relation to the costs of pregnancy and motherhood are prohibited altogether. In addition the ECJ, in its *Test Achats* ruling of 01/03/2011 (C-236/09), has decided that in contrast to the German law any differentiation with relation to gender must end by 21/12/2012. The new regulations have raised a whole series of questions. One such question concerns the impact of equality law on the insurance of HIV-infected people. While a disease as such is not protected against discrimination by the Equal Treatment Act, differences due to an HIV infection or because of AIDS can be measured in terms of the grounds of disability and sexual identity in the Equal Treatment Act. This is to be examined in more detail below.

In Germany, some 78,000 people live with an HIV infection.[3] In spite of advanced medical treatment options, the infection may still lead to a destruction of the immune system and thereby

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cause opportunistic secondary diseases such as severe pneumonia or cancer, which, as a whole, define the AIDS disease.

Since the discovery of AIDS in 1982, treatment options have improved significantly. In addition, social attitudes towards the disease have changed: While during the mid 1980's only 49% of the German population considered a social isolation of AIDS sufferers as "not right", this figure meanwhile has increased to 94%. This is not least due to the socio-political awareness on HIV and AIDS, which in, addition to prevention, aims at tolerance towards those affected and their social integration. The Equal Treatment Act, which is based on two European anti-discrimination directives with relation to race / ethnicity and gender, is pursuing a similar goal. However the Equal Treatment Act exceeds those requirements. Sect. 19, 20 Equal Treatment Act serve to counteract unjustified differences of treatment based on race / ethnicity, gender, religion, disability, age or sexual identity and the personal degradation associated with such discrimination. According to Sect. 19 para. 1 No. 2 Equal Treatment Act the principle of equal treatment explicitly includes insurance contracts.[4] This is remarkable as private insurance is characterized by differentiations and thus is distinguished from all other types of contracts covered by the Equal Treatment Act. Therefore, first of all the guidelines for the application of this Act to insurance contracts shall be discussed.

## 2. Guidelines for the Application of the Equal Treatment Act to Insurance Contracts

The Equal Treatment Act, in its Sect. 19 para. 1 No. 2, provides that insurance contracts are to be treated just like the so-called bulk contracts (No. 1), which are typically concluded without regard to the individual characteristics of the contracting party (such as gender or age), or at least with those characteristics only having secondary importance. Examples of such bulk contracts are the sale of goods in a department store or via Internet. In contrast, for the decision of an insurer to conclude an insurance contract as well as for the definition of benefits and premiums the individual characteristics of the policyholder are usually instrumental. In order to justify the fact that insurance contracts, unlike loan agreements, are treated in the same way as bulk contracts, the legislator mainly offers socio-political considerations. In particular, it is considered necessary to ban "socially unjustifiable distinctions", as insurance contracts play a vital role with regard to protection against the risks of life.

The fact that this socio-political consideration is not able to convince is clearly demonstrated by the topic to be examined here. In fact HIV-infected people and AIDS patients have a particular interest in being able to base their future health and life planning on private health insurance and life insurance. However, as the disease is complex and unpredictable in its development the risk for the insurer is particularly difficult to calculate. This affects the interest of the insurer, but also the interest of each other policyholder in the same community of risk related to risk-adequate premiums and conditions. It cannot be inferred solely from the significance of a particular insurance coverage for the risks of life of individuals that the individual risk assessment by the insurance company would have to stand back. In truth, the aim of any protection against discrimination in general and particularly in the area of private insurance is not to offer some kind of basic social security, but to protect the individual against an attack on the claim to respect. This attack lies in an arbitrary discrimination on the basis of (regularly immutable) characteristics which are not significant for the completion and content of the contract.

[3] *Robert Koch Institute*, Epidemiologisches Bulletin 22/2010, 209.

[4] BT printing 16/1780, p.22. For the US (relevance of the Americans with Disabilities Act for insurance coverage decisions) see Manning, Cal. Law Review, Vol. 88:607, p. 609 et seq.

In private insurance law risk-based differentiation is a prerequisite for the proper functioning of the contract. Sometimes it is even required by regulatory law explicitly. E.g. Sect. 12 para. 1 No. 1 German ISA (VAG) provides that in substitutive health insurance an age-based pricing is required. Even beyond such explicit rules due of the risk of adverse selection risk-related distinctions are regularly necessary: If different risks are to be insured at identical terms and conditions the insurance protection is devalued for policyholders with lower risks, as they have to co-finance the higher risks. This can lead to low-risk policyholders moving to other providers or waiving insurance coverage altogether, which further increases the price of coverage for the remaining high-risk policyholders. Both effects are to be avoided in order to keep private insurance attractive.

The legislator of the Equal Treatment Act was well aware of the fact that differentiations are crucial for the functioning of private insurance policies. According to the materials of the legislative process the application of the general prohibition of discrimination on private insurance contracts is intended only to offer victims of arbitrariness protection. The legislator reflects this limited purpose on the level of justification, as in Sect. 20 para. 2 sentence 3 Equal Treatment Act under certain conditions a differentiation between policyholders on grounds of religion, disability, age or sexual identity is admissible. A more limited possibility for justification exists with regard to gender-related differences, a rule which, due to the ruling of the European Court of Justice in the *Test Achats* case,[5] will have to be banned by 21/12/2012. For the interpretation of the justification rules (see infra, 3.3), it is important to keep in mind the legislative goal of ban only with regard to arbitrary differentiations.

## 3. Discrimination on Grounds of Disability

### 3.1 Concept of Disability

#### 3.1.1 Interpretation standards

If one takes into account the characteristics protected by the Equal Treatment Act it is to be considered that both an HIV infection and AIDS may be classified as disabilities. This leads to the question what is meant by a disability in the sense of Sect. 19 para. 1 Equal Treatment Act. So far no autonomous European legal definition has been developed. In the existing EU Directives the principle of equal treatment with respect to disability has so far only been introduced in the area of employment law. Correspondingly the Equal Treatment Act contains a ban on discrimination with regard to disability (Sect. 7 para. 1 in conjunction with Sect. 1 Equal Treatment Act). This suggests to first examine the European concept in order to avoid an inconsistent interpretation of the feature within the Equal Treatment Act.

Until now no Directive has specified the notion of disability any closer. Thus the focus is on the case law of the ECJ. In 2006, in the Case *Chacón Navas* the ECJ ruled that the concept of disability is to be interpreted autonomously, taking into account the context of the provision and the objective of the control.[6] According to the ECJ, a disability is a limitation which is mainly due to physical, mental or psychological impairments and which, in addition, constitutes an obstacle to the participation in working life over an extended period of time. Furthermore the Court points out that not every illness is a disability, and that illness is not protected in addition to disability as a further feature of the Directive 2000/78/EC, which concerns anti-discrimination in employment law. So far no specification that goes beyond these statements has been offered by the ECJ.

At the level of German law the legislator of the Equal Treatment Act has not explicitly taken a position with regard to the question of whether an HIV infection is to be classified as a disability.

[5] ECJ, case C-236/09 – *Test Achats*, OJ C 130 of 30/04/2011, p. 4.
[6] ECJ, C-13/05 – *Chacón Navas*, 2006 ECR I-6467.

The government generally states that in recent decades the international community has been concerned with the discrimination "of people with disabilities and people living with HIV"[7]. However it is doubtful whether this constitutes a deliberate exclusion of the HIV infection from the definition of disability term. Such a specification can be found in German social law. According to the legal definition in Sect. 2 para. 1, SGB IX people are handicapped, *"if their physical function, mental capacity or mental health differs probably for more than six months from the condition typical for the age and therefore their participation in the life of society is impaired"*.

In the eyes of the German legislator this two-tier definition is to be applied for the interpretation of the concept of disability in the Equal Treatment Act. With regard to the specified fixed period of six months and the requirement of a deviation from the typical capabilities of persons of the same age, the simple adoption of the statutory definition in social security law for general equality law is not self-evident. However, with regard to the question of whether an HIV infection may be seen as a disability this question can be left open, as the infection meets the requirements of the six-month period and the deviation from the usual state of health of people of the same age. Since this is a chronic disease the function of the longer term requirement, which is to distinguish disease (short term) from disability (permanent), does not apply here.

It is worth while considering whether disability in the meaning of Sect. 19 Equal Treatment Act requires a certain level of intensity, e.g. degree of at least 50% (see Sect. 2, para. 2 SGB IX). For the constitutional concept of disability in Article 3 para. 3 sentence 2 of the German Basic Law (Constitution), before Sect. 2 para. 1 SGB IX entered into force, some authors favored a limitation to such severe disabilities. However this cannot convince. Article 3 para. 3 sentence 2 Basic Law is to protect against unjustified unequal treatment, whereas social security law is directed primarily to a tiered compensation system. For the same reason the definition of disability with regard to the Equal Treatment Act is not to be limited to severe disabilities.

### 3.1.2 Clarification of the two-tier concept of disability

For the question of whether an HIV infection is to be regarded as a disability, according to the considerations made above, the legal base is a bipartite disability concept where the medical-pathological element is joined by a participatory element.

#### 3.1.2.1 Medical and pathological elements of the concept of disability

In any case any disability requires a physical, mental or psychological impairment.[8] Furthermore, the reference to physical functions in Sect. 2 para. 1 SGB IX leads to the conclusion that, according to the traditional concept of disability, a functional impairment is necessary. According to another approach in literature, it is essential whether the condition is medically treatable. According to those authors a disability exists if in a permanent state of physical or mental deficits treatment may lead to an improvement or relief. This understanding removes the course from the wording of the law and from its purpose, which is to capture the current state without regard to whether this is irreversible or modifiable as long as the six-month period is met.

#### 3.1.2.2 Participatory element of the concept of disability

The participatory part of the disability definition goes back to the "International Classification of Functioning *(Functioning)*, handicap *(disability)* and health *(Health)*, ICF,"[9] adopted by the World Health Organization (WHO) in May 2001. Thus, disability is understood not as a defect of the affected individual, but as an interaction between a person's health problems and their environmental context factors. Accordingly disability is seen primarily as a social relationship and not as a personal property – one *is* not disabled, but one is *being* disabled. This view – which is at

[7] BT-printing 16/1780, 20. 16/1780, 20.

[8] ECJ, C-13/05 – *Chacón Navas*, 2006 ECR I-6467; *Dau / Düwell / Haines,* SGB IX, sect. 2 para. 6 et seq

[9] Available at http://www.dimdi.de/static/de/klassi/icf/index.htm : see also *Knickrehm,* SgB 2008, 220, 221, *v. Roetteken,* AGG, 2007, Sect. 1 para. 168.

least modified by the causality requirement in Sect. 2 para. 1 SGB IX – is shared by the ECJ in its ruling in the case of *S. Coleman*. [10] In that case the ECJ has considered the mother of a physically handicapped child who has been discriminated against by employers because of her care for the child to be discriminated against for reasons of a disability. Of course, yet a disability must be existent at least with another person.

### 3.2 Application to the HIV-infection

#### 3.2.1 The starting point

The outbreak of the incurable disease AIDS regularly meets all the features of a disability, and even the qualified requirements of a severe disability as defined in social security law. Accordingly, in this case under the relevant German Social-Medical care principles a degree of disability of 50-100 percent is to be set. It is problematic and controversial, however, whether the mere HIV infection should be considered as a disability as well. In literature, this question is now frequently answered in the affirmative. This is done partly with reference to U.S. discrimination law. However the reliance on the U.S. law max not convince. The U.S. *Americans with Disabilities Act* is based on an understanding of disability that is different from European or German anti-discrimination law. Under U.S. law there is a disability if due to a physical impairment of one or more "*major life activities"* cannot take place without restriction any more. One of the major life activities in this sense is, according to the U.S. Supreme Court[11] , sexual activity, so that a restriction from the date of infection and thus portability is to be assumed. According to this understanding a communicable disease already leads to the classification as a disability, while the ECJ differentiates precisely between disease and disability.

#### 3.2.2 Medical and pathological element

With regard to the HIV infection sometimes it is claimed that a functional impairment is absent. However, a more nuanced assessment is necessary. The infection may cause several physical or mental impairments even before the transition to the clinical picture of AIDS. For example, about half of all diagnosed HIV patients suffer from depression because of their stressful situation and perspective even before specific other signs of disease become apparent. In such cases, there exists already a functional impairment. As long as the infection remains completely without clinical symptoms, however, the hallmark of a functional impairment is sometimes put into some doubt. However, already the increased susceptibility to infections represents such impairment, even if it has not yet resulted in subsequent infections. Accordingly the German medical care principles for assessing the degree of disability recognize a disability level of 10 percent for an HIV infection without clinical symptoms. The same conclusion, i.e. a classification of asymptomatic HIV infection as a disability, is reached by those authors who consider the possibility of cure as the core criterion.

#### 3.2.3 Participatory element

In the context of an HIV infection the precondition that participation in the life of society is complicated due to the impairment leads to a practically important question. This is whether the participation in social life may be affected already by the mere fact that other people deal with the person in a derogatory and dismissive manner because of his or her HIV infection. This becomes practically relevant if the person is not already limited in participating in everyday life due to physical or mental impairment of function, such as a depression.

As shown, the Equal Treatment Act, in accordance with the European Directives, pursues the goal of banning arbitrary differences in treatment and the exclusions associated with them. It could

[10] ECJ, Case C-303/06 – *Coleman*, OJ 2008, I-5603; *Welti,* ZESAR 2009, 148.

[11] U.S. Supreme Court, *Bragdon vs. Abbot*, 524 US 624 (1998); *Zimmer/Sullivan/White*, Cases and Materials on Employment Discrimination, 2003, 680 ss.

be objected that to include the exclusion probability already in the definition of the criterion of discrimination (in this case: disability) means protective purpose and criterion are mixed together. On the other hand, a connection to the medical-pathological element is created by the fact that this very element has must have led to the deterioration of participation. That causal relation may lie in the reactions of the environment on the medical and pathological impairment. Thus, the German Federal Social Court has founded the disability status of women who suffer from baldness on the fact that the impairment "constantly attracts attention" and promotes "isolation".

In the social exclusion, therefore, the participatory element of the concept of disability may be realized. This requires that in society the physical, mental or psychological limitation is evidently charged with negative stereotypes.

Although since the discovery of the disease attitudes towards HIV-infected individuals have changed significantly, in everyday life – with variations depending on region, age, ethnicity and education level – there are still prejudices concerning personal lifestyles or the transmissibility of the disease. Often these conscious or subliminal prejudices result at least in avoidance. Therefore, e.g. the World AIDS Day on 1.12.2009 was held under the motto of combating stigma. Of course, there is a difference to the example of the baldness of women mentioned above insofar as an asymptomatic HIV infection is not readily noticeable to the outside world. However, the well-founded fear of exclusion may complicate participation in social life.

An impairment of participation in social life is therefore to be assumed even for a symptom-free HIV infection. In application of the two-tier concept of disability this leads to the same assessment as the classification of the infection as a disability with a grade of 10 percent in the medical principles mentioned above.

### 3.3 Justification of Unequal Treatment

According to Sect. 20 para. 2 sentence 3 Equal Treatment Act an unequal treatment due to a disability is justified if it is based on recognized principles of risk-adequate pricing, particularly on a risk assessment that is actuarially determined by reference to statistical surveys. Regarding private health insurance, HIV-infected persons as well as people with AIDS typically cause higher treatment costs. Often the HIV infection requires costly medication already in the early stages in order to prevent the outbreak of the immune defect as long as possible. The risk to be insured has materialized in the form of an HIV infection before, so that a contractual exclusion of the risk is justified in view of the equal treatment law. The justification of Sect. 20 para. 2 sentence 3 Equal Treatment Act intervenes even if the insurer provides for risk exclusion in the event of actual outbreak of AIDS in conjunction with a premium surcharge for the costs within the period of latency. In addition the so-called basic tariff that is has been introduced in German private health insurance for persons with a low income offers HIV-infected persons a cover which is completely independent of the anti-discrimination laws.

In the areas of life and health insurance, the medical advances that have recently been achieved have to be taken into account. Thus, the increased number of HIV-infected persons is partly attributable to the significant reductions in mortality.[12] However AIDS still clearly increases the risk of death, so that relevant differences in treatment are still justified. As to the mere HIV infection, the statistical risk increase should be judged even more individually as factors such as individual symptoms and viral load play a crucial role. Of course, in this case increased treatment costs and the uncertainty about the further development have to be taken into account as well.

[12] *Robert Koch-Institute*, Epidemiologisches Bulletin 47/2008, p. 410.

## 4. Discrimination Based on Sexual Identity

When dealing with insurance of risks of HIV-infected people from the perspective of equality law, attention is focused on the feature of disability. However the protection of sexual identity against unequal treatment may also be significant. This is true with regard to direct as well as indirect discrimination. Direct discrimination based on sexual identity takes place when an insurer declines to contract with a homosexual person solely because of an alleged increased risk of a HIV infection and not with regard to a positive test result. In accordance with Sect. 20 para. 2 sentence 3 Equal Treatment Act any such discrimination may only be justified if the insurer can prove that the denial is based on recognized principles of adequate risk calculation. In order to establish this fact the insurer needs to show the supposed connection between homosexuality and an increased risk of infection by reference to statistics or medical experience. There is a controversy about to what extent this may be achieved. Some authors even generally deny the relevance of the criterion of sexual identity for the insurance sector.

According to the statistics of the German *Robert Koch Institute*, 67% of new infections with HIV in Germany in 2009 accounted for men who have sex with men. This might be interpreted as establishing an increased risk so that an increased premium (or even denial of contract) would appear to be justified. However the use of such statistics as the sole basis to justify any such differentiation according to Sect. 20 para. 2 sentence 3 Equal Treatment Act appears vulnerable in several respects. First, the figures provided by the Robert Koch Institute are based only on estimates. It is still not known how many men in Germany are actually gay and how many of them are infected with HIV. Furthermore, several years may pass by between the infection and its detection, which sometimes distorts the statistics. On the other hand one can certainly argue that the actual differences are not likely to be significant enough to alter the basic message.

However some concern against the use of the statistical relationship for a justification of unequal treatment exists, inasmuch as a causal link between sexual identity and increased risk of infection is missing. Rather, the risk is increasing as a result of various factors, including certain forms of behavior (promiscuity and unprotected sex) and lifestyles (e.g. place of residence, membership in certain social strata). Therefore sexual identity is a so-called *proxy*, i.e. a proxy feature that is only used as a reliable collection and use of causal risk factors present considerable difficulties. At least in theory it would be preferable to rely as far as possible on specific individual risk factors instead of the sexual identity. In practice, however, this will be difficult because of the limited possibility to discover and check those individual factors and their variability. Therefore similarly to the criterion gender that of sexual identity must serve as a proxy feature for justification as long as statistical evidence or medical experience may provide a reliable basis for unequal treatment. In that case, there is no risk of arbitrariness, which the legislator aimed at banning in the field of private insurance policies.

If an unequal treatment is not based on the sexual identity but on a definite HIV infection then a mere indirect discrimination based on sexual identity is in question. Indirect discrimination according to the legal definition of Sect. 3 para. 2 Equal Treatment Act means that an apparently neutral provision, criterion or practice would put persons with certain features at a particular disadvantage compared with other persons, without this being justified.

A qualified association between the differentiation attached to the HIV infection and the sexual identity of the person concerned is already to be considered as an element needed for the notion of discrimination. Thus, in contrast to direct discrimination, it is important not only on the level of justification of discrimination. As shown, the statistics certainly establish a relevant connection. In other words, if the insurer links a difference of treatment to an existing HIV infection, this adversely affects homosexual persons who want to conclude an insurance contract in a particular way. Of

course, as mentioned above, indirect discrimination does not fulfill the legal criteria if the differentiation is justified. For such justification it is not the relatively stringent requirements of Sect. 20 para. 2 sentence 3 Equal Treatment Act that are relevant, but the ones laid down in Sect. 3 para. 2 Equal Treatment Act. Accordingly, it suffices for justification that the discrimination is objectively justified by a legitimate aim and if proportionality is respected. In practice these requirements will usually be met because the achievement of risk equivalent rates, terms and conditions is a legitimate target.

As an existing HIV infection is to be considered a disability, in addition the insurer has to meet the more stringent requirements for the justification of a direct discrimination, so that an additional indirect discrimination because of sexual orientation won't have much impact in practice.

## 5. Risk Identification (Issue of HIV Status, Request of HIV Test)

At this point, it shall be discussed to which extent the ability of the insurer to ask about the HIV status or to request an HIV test as part of risk assessment is affected by the Equal Treatment Act. It should first be noted that the prohibition of discrimination in Sect. 19 para. 1 Equal Treatment Act refers only to differences of treatment "in the establishment, implementation and completion" of obligations in private law. If the question concerning the results or the request for HIV testing is put forward to any applicant regardless of their sexual orientation this doesn't constitute a direct discrimination, as such can only lie in actual differentiations according to the HIV status with regard to the conditions of the contract.

In addition, the insurer has a legitimate interest to know the HIV status of insured persons. As stated, in private insurance law the risk assessment based on the information made available by the policyholder is essential for the operation and functioning of the contract. The situation is far different from employment law, where the right to investigate a disability is restricted by the significance of any such impairment for the activity in question. However, if an insurer should raise the question or request exclusively with prospective homosexual customers this would be a direct discrimination based on sexual identity. Such behavior may only be justified if other persons with typically increased risks such as consumers of intravenously administered drugs or migrants from HIV high prevalence countries are treated in the same way.

Further doubts arise as customers who are not members of the risk groups may be HIV-infected, so that if the collection of information is limited to the members of risk groups there may be unequal treatment based on ignorance by the insurer of the HIV status of certain clients. Readily acceptable, however, are differentiations with regard to the HIV question or test based on the sum at stake, such as when in life insurance from an insurance sum of EUR 1 million all interested parties are indiscriminately asked for an HIV test.

If an applicant incorrectly answers the question about the HIV status, the legal sanctions attached hereto will not be modified by the Equal Treatment Act. Therefore the insurer has the cancellation and termination options laid down in Sect. 19 para. 2 through para. 4 of the German Insurance Contract Code (VVG). Furthermore the right to end the contract provided in Sect. 123 of the German Civil Code (BGB) may be exercised if an insured deliberately made false statements about his or her HIV status in the contract. The exercise of that right is no violation of the prohibition of discrimination in Sect. 19 para. 1 No. 2 Equal Treatment Act, as it is only the deception and not the disability that leads to the contract to be disrupted.[13]

[13] OLG Saarbrücken VersR 2009, 1522, 1525.

## 6. Practical Ways to Avoid Conflict

The previous considerations have shown that in the insurance sector the legal criteria of unequal treatment based on disability and, under stricter conditions, sexual identity may be fulfilled. However in practice such distinctions are regularly justified according to Sect. 20 para. 2 sentence 3 Equal Treatment Act. Regardless of this, the question arises what options are available to the insurer in order to avoid possible conflicts with stakeholders.

### 6.1 Expansion of the Risk Assessment

As indicated, risk-equivalent tariffs, terms and conditions are constitutive for the proper functioning of private insurance. Often an insurer will not be able to replace such risk factors by at least as meaningful, reliable and easily identifiable alternative factors. Having said this, the risk assessment may sometimes be made on a broader basis, in which a risk factor (such as HIV infection) is not replaced, but another characteristic is added. Some practical examples are the differentiation made between smokers and nonsmokers, or the grant of discounts for completing a specific fitness program. In such cases, the persons concerned may, at least to some extent, autonomously decide if they are willing to qualify for favorable conditions.

### 6.2 Development of New Products

It is not long ago that for HIV-infected persons it was virtually impossible to obtain cover such as a death benefit. However the picture recently has changed, as experiences anti-discrimination organizations have made shows.[14] For instance, while a protection against disability still remains difficult, it is now possible to a certain extent to take insurance against the risk of death.[15] The insurance contract will regularly be linked to certain conditions which the policyholder has to meet, such as the consistent treatment in antiretroviral standard therapy or a variety of physical conditions, such as a certain maximum limit of viral load associated with a minimum number of existing immune cells. In addition, the applicant will regularly have to accept a premium that corresponds with the increase in risk.[16] Market developments in other European countries are similar. E.g., the French reinsurer SCOR has made recommendations concerning the question under what conditions the risks of HIV-infected applicants for life insurance are principally to be deemed insurable. Dutch life insurers offer special HIV policies, for which the policyholder has to accept premiums that are two to three times higher than the ordinary tariff.

Furthermore, instead of rejecting any contract the insurer may offer limited insurance coverage. In addition to statistics the insurer may use medical experience for the justification of differentiations based on Sect. 20 para. 2 sentence 3 Equal Treatment Act. This is of particular importance for the introduction of innovative insurance products such special contracts for HIV-positive persons, as often there are still no comprehensive statistics available.

### 6.3 Communication

Another contribution to conflict prevention lies in sound communication. It may be crucial for acceptance that the reasons for a justified unequal treatment are presented in a comprehensible way to the person concerned. More often than not customers are by no means sufficiently aware of the functioning of insurance, which is largely based on risk-adequate premiums, terms and conditions.

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[14] Thus the Lesbian and Gay Federation in Germany (LSVD) has received no notices about contract rejections since the implementation of the Equal Treatment Act; http://www.lsvd.de/644.0.html # c3723.

[15] See *Regenauer,* VersMed 2009, 32; *Siebers,* VW 2008, 1216. For recent developments in South Africa see http://www.economist.com/node/8143003

[16] See *Timmermann* in circular 5/2009, text available at http://www.ondamaris.de/?p=8622 : In the test case, the insurer demanded an additional risk premium for HIV-infected applicants of (only) 30%.

The same is true for the fact that private insurance is not aimed at cross-subsidizing higher risk carriers by those with lower risks, but at individual provisioning. If it is made clear to the client that a contract rejection, risk exclusion, or premium surcharge on the application of those rules is based on a principle which is fundamental to the functioning of insurance then even the slightest suspicion of an arbitrary discrimination may be challenged.

## 7. Summary and Outlook

While the HIV infection fulfills the legal criteria to be classified as a disability, unequal treatment is legitimate due to the increased risk linked with it. Any differentiation which is linked to HIV infection, as long as it meets the lesser justification requirements of Sect 3 para. 2 Equal Treatment Act, is not to be considered as indirect discrimination based on sexual identity. The question about an existing HIV infection and the request for a test are in conformity with the Equal Treatment Act.

On the European level currently the draft of a fifth anti-discrimination Directive has entered the legislative process. This new Directive is aimed at an extension of the anti-discrimination rules to the criteria of religion or belief, disability, age and sexual orientation. Since the German legislator has already anticipated this move in 2006, only small changes to German law are to be expected. This applies in particular to the requirements for the justification of unequal treatment.

The draft Directive of 02/07/2008[17] originally copied the very strict requirements of the Gender Directive. However by resolution of the European Parliament of 02/04/2009[18] the wording has been changed, thus reducing the justification requirements. According to the revised draft disability and age-related actuarial factors should not be considered discriminatory if it is established that these are important factors for risk assessment and if the insurer on the basis of actuarial principles or statistical or medical data may demonstrate significantly higher risks. Furthermore the draft assumes that the term "medical data" is limited to objective and verified medical facts and secured medical knowledge, which is consistent with the standards for the collection of medical data. If this version of the Directive is going to be adopted by the European Parliament, there will probably be some dispute about the conditions under which the medical knowledge applicable to new diseases may already be considered "secured". It appears appropriate that the requirements should not be too strict since in the area of private insurance policies – as shown – only arbitrary differentiations have to be banned and at the same time there is the risk of adverse selection to be taken into account.

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